

Digitized by the Internet Archive
in 2007 with funding from
Microsoft Corporation

*Rebuck for amold
every four*

New York (State) Reports.

REPORTS
OF
PRACTICE CASES,
DETERMINED
IN THE
COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
NEW-YORK REPORTS ISSUED DURING THE PERIOD
COVERED BY THIS VOLUME.

BY

BENJAMIN VAUGHAN ABBOTT,

AND

AUSTIN ABBOTT,

COUNSELORS AT LAW.

NEW SERIES.

VOL. II.

NEW-YORK:

DIOSSY & COCKCROFT,

Law Booksellers and Publishers, 71 Nassau Street,
CORNER OF JOHN.

1867.

FacLib

KFN

5994

.A51

v. 2

~~F.L.~~

~~S~~

~~New Y 71~~

~~Ab 29~~

~~v. 2~~

[Entered, according to Act of Congress, in the year One Thousand Eight Hundred and Sixty-seven, by DIOSSY & COCKCROFT, in the Clerk's Office of the District Court for the Southern District of New-York.]

JOHN W. AMERMAN, PRINTER,
No. 47 Cedar St., N. Y.

TABLE

OF THE

CASES REPORTED IN VOLUME II., NEW SERIES.

	PAGE		PAGE
A.		Brooks, Clark <i>v.</i>	385
Ackroyd <i>v.</i> Ackroyd.....	380	——, Goodyear <i>v.</i>	296
Adams <i>v.</i> Bush.....	104, 112, 118	Bush, Adams <i>v.</i>	104, 112, 118
Attachment, The Commissioners' 83		Bushnell <i>v.</i> Eastman.....	411
		Butler, Siebrecht <i>v.</i>(note)	361
B.		C.	
Babcock's Case.....	204	Cagger, People <i>ex rel.</i> <i>v.</i> Supervi-	
Banks, People <i>ex rel.</i> <i>v.</i> Board of		sors of Schuyler.....	78
Education.....	177	Carter <i>v.</i> Loomis.....	295
Baptist Church in Oliver St., Mad-		Caujolle <i>v.</i> Ferrie.....(note)	3
ison Avenue Baptist Church		Cauldwell, Maretzek <i>v.</i>	407
<i>v.</i>	254	City of Brooklyn, Bird <i>v.</i>	132
Barlow <i>v.</i> Barlow.....	259	Clark <i>v.</i> Brooks.....	385
Barnard <i>v.</i> Heydrick.....	47	——, Keene <i>v.</i>	341
Barnes <i>v.</i> Southside R. R. Co....	415	Coe <i>v.</i> Schultz.....	193
Bean <i>v.</i> Pettingill.....	58	Colburn, Hazelton <i>v.</i>	199
Bird <i>v.</i> City of Brooklyn.....	132	Commissioners' Attachment, The.	83
—— <i>v.</i> Hayden.....	61	Connolly, People <i>ex rel.</i> Wood <i>v.</i>	315
Board of Education, People <i>ex rel.</i>		Consolidated Silver Mining Co.,	
Banks <i>v.</i>	177	Johnson <i>v.</i>	413
Bowen, Leeds <i>v.</i>	43		
Bradley, People <i>ex rel.</i> <i>v.</i> Steph-		D.	
ens.....	348		
Broadway Bank, Lewis <i>v.</i>	93	De Camp <i>v.</i> Marshall.....	373
Brooklyn, Bird <i>v.</i> City of.....	132	Dever, O'Hara <i>v.</i>	418

	PAGE		PAGE
E.		Leeds v. Bowen.....	43
Eastman, Bushnell v.....	411	Lent, Gillies v.....	455
Evans, Wright v.....	308	Lewis v. Broadway Bank.....	93
F.		Limburger v. Rauch.....	279
Fannin v. McMullin.....	224	Lindsley v. Simonds.....	69
Ferrie, Caujolle v.....(note)	3	Livingston's Petition.....	1
Fettrich v. Totten.....	264	Loomis, Carter v.....	295
Fitzgerald, Petrie v.....	354	M.	
Flanagan, Matsell v.....	459	McMullen, Fannin v.....	224
G.		McWilliams v. Mason.....	211
Gillies v. Lent.....	455	Madison Avenue Baptist Church	
Goodyear v. Brooks.....	296	v. Baptist Church in Oliver	
H.		St.....	254
Hadfield v. Mayor, &c. of N. Y..	95	Magnus v. Trischet.....	175
Hager v. Tibbits.....	97	Manley, Kowing v.....	377
Harman v. Remsen.....	272	Maretzek v. Cauldwell.....	407
Hayden, Bird v.....	61	Marshall, De Camp v.....	373
Hazelton v. Colburn.....	199	Mason, McWilliams v.....	211
Herforth v. Herforth.....	483	—— v. Ring.....	322
Heydrick, Barnard v.....	47	Matsell v. Flanagan.....	459
——, Silleck v.....	57	Matter of Wheeler.....	361
Hudson River R. R. Co., People		Mattier, People v.....	289
v.....	249	Mayor, &c. of N. Y., Hadfield v..	95
J.		——, Pullman v.....	29
Jenks, Thompson v.....	229	——, Ross v.....	266
Johnson v. Consolidated Silver		Midgely v. Slocomb.....	275
Mining Co.....	413	Moltz, Purves v.....	409
K.		Murray, Williams v.....	292
Keene v. Clark.....	341	Mutual Benefit Life Ins. Co. v.	
Knapp, Short v.....	241	Supervisors of N. Y.....	233
Kowing v. Manley.....	377	Mutual Life Ins. Co. v. O'Reily..	167
L.		N.	
Lamb, People v.....	148	National Bank v. Sackett.....	286
Leach v. Weeks.....	269	Newell v. Wheeler.....	134
		New Haven Steamboat Co., New	
		York Piano Co. v.....	357
		New York Piano Co. v. New Ha-	
		ven Steamboat Co.....	357
		O.	
		O'Hara v. Dever.....	418
		O'Reily v. Mutual Life Ins. Co..	167

TABLE OF CASES.

v

	PAGE		PAGE
Ormsbee, Pine v.....	375	S.	
Osgood, Pardo v.....	365	Sackett, National Bank v.....	286
		Schultz, Coe v.....	193
P.		Schuyler, Supervisors of, People	
Paddon v. Williams.....	88	<i>ex rel.</i> Cagger v.....	78
Pardo v. Osgood.....	365	Short v. Knapp.....	241
Patten, Ruthven v.....	121	Siebrecht v. Butler.....(note)	361
Pennell v. Wilson.....	466	Silleck v. Heydrick.....	57
Pennsylvania R. R. Co., Rawson		Simonds, Lindsley v.....	69
v.....	220	Slocomb, Midgeley v.....	275
People (<i>ex rel.</i> Banks) v. Board of		Southside B. R. Co., Barnes v....	415
Education.....	177	Stephens, People <i>ex rel.</i> Bradley	
—— (<i>ex rel.</i> Wood) v. Connolly	315	v.....	348
—— v. Hudson River R. R.		Supervisors of Schuyler, People	
Co.....	249	<i>ex rel.</i> Cagger v.....	78
—— v. Lamb.....	148	—— of New York, Mutual	
—— v. Mattier.....	289	Benefit Life Ins. Co. v.....	233
—— (<i>ex rel.</i> Bradley) v. Steph-			
éns.....	348	T.	
—— (<i>ex rel.</i> Cagger) v. Supervi-		Thompson v. Jenks.....	229
sors of Schuyler.....	78	Tibbits, Hager v.....	97
Petition of Livingston.....	1	Totten, Fettrich v.....	264
Petrie v. Fitzgerald.....	354	Trischet, Magnus v.....	175
Pettingill, Bean v.....	58		
Pine v. Ormsbee.....	375	W.	
Pullman v. Mayor, &c. of N. Y..	29	Walton v. Walton.....	428
Purves v. Moltz.....	409	Weeks, Leach v... ..	269
		Wheeler, Matter of.....	361
R.		Newell v.....	134
Rauch, Limburger v.....	279	v. Ruckman.....	186
Rawson v. Pennsylvania R. R.		Williams v. Murray.....	292
Co.....	220	Paddon v.....	88
Reilly's Case.....	334	Wilson v. Pennell.....	466
Remsen, Harman v.....	272	Wood, People <i>ex rel.</i> , v. Connolly	315
Ring, Mason v.....	322	Wright v. Evans... ..	308
Ritterman, Zinn v... ..	261		
Ross v. Mayor, &c. of N. Y.....	266	Z.	
Ruckman, Wheeler v.....	186	Zinn v. Ritterman.....	261
Ruthven v. Patten.. ..	121		

INDEX

TO THE

CASES REPORTED IN VOLUME II., NEW SERIES.

A.

	PAGE
<i>Abatement of nuisance</i> —common law right of.....	193
<i>Actions</i> —against officers, what are, and where to be brought.....	78
—— by one in whose name another person does business.....	88
—— to re-instate member of insurance company.....	167
—— lies against married woman for tort of her servant in her separate business.....	455
<i>Account</i> —numerous items of damage do not constitute a long account....	266
<i>Accounting</i> —required from partner, for transactions subsequent to termination of partnership.....	375
<i>Administrator</i> —de bonis non, may maintain action against executor of former administrator.....	428
<i>Affidavit</i> —to procure mandamus, when deemed evasive.....	78
—— may be used in another suit than that in which it was made.....	47
<i>Alimony</i> —allowed, although evidence of marriage is doubtful.....	483
<i>Amendment</i> —by filing order of publication <i>nunc pro tunc</i>	4
<i>Answer</i> —in action for libel.....	97
—— time to, cannot be extended <i>ex parte</i> after it has expired.....	354
<i>Appeal</i> —an irregular order, if right upon the merits, may be confirmed..	292
—— what is decision of, within meaning of order staying proceedings until decision.....	354
—— when does not lie from an order refusing to attach for contempt..	380
—— to the Court of Appeals in special proceedings, raises questions of substantial irregularity.....	1
—— to the Court of Appeals, from an order denying a motion for a new trial, made on the ground of newly discovered evidence.....	104
—— does not lie to Court of Appeals from order denying new trial of special issues.....	385
<i>Appointment</i> —and removal of school officers in the city of New York....	177
<i>Arbitration</i> —effect of award made under a special statute.....	269

	PAGE
<i>Arrest</i> —what precludes the creditor from arrest, by reason of having sued in affirmance of the contract.....	261
—— laches in charging the defendant in execution.....	245
<i>Assets</i> —what amounts to administration of.....	428
<i>Assignment for benefit of creditors</i> —fraudulent if schedule omits part of assets.....	373
—— marshalling assets where a creditor holds collateral security.....	275
<i>Attachment</i> —notice served on debtor and the defendant in an attachment.....	272
<i>Attachment for contempt</i> —for not accounting; property, mode of applying for.....	380
<i>Attorney and client</i> —of the validity of gifts and conveyances to the attorney by the client.....	322
<i>Award</i> —not valid if the arbitrators exceed the submission.....	269

B.

<i>Bail in criminal cases</i> —when allowed.....	204
<i>Bank</i> —designation of as depository by Chamberlain of New York.....	93
<i>Bequest</i> —subject to dower and thirds, not a bequest to wife of thirds of personalty.....	418
<i>Bills, notes and checks</i> —laches in presenting.....	199
<i>Board of Education</i> —powers of, in appointing school officers.....	177

C.

<i>Case</i> —not amended so as to state that it contains all the evidence given..	175
—— not corrected after appeal is pending in the court above.....	118
<i>Certiorari</i> —the proper remedy to correct an assessment.....	233
<i>Challenge</i> —for principal cause, when does not lie on the ground of opinion against plaintiff's business.....	407
<i>Charge</i> —proper terms of, in action for negligence.....	241
<i>Clerk</i> —power of to tax costs of appeal.....	466
<i>Commissions</i> —of auctioneers upon interrupted sale.....	43
<i>Complaint</i> —against stockholders for debt of corporation.....	69
—— requisites of, in action by administrator <i>de bonis non</i> , to recover unadministered assets.....	428
<i>Compromise</i> —by guardian of infants, how far binding.....	1
<i>Constitutional law</i> —what are local statutes.....	343
<i>Contracts</i> —construction of an exception in a condition.....	134
—— excuse for non-performance of condition.....	167
—— as to payment of taxes, as between vendor and purchaser.....	466
<i>Conversion</i> —when demand before suit must be proved respecting goods delivered by mistake.....	409
<i>Corporations</i> —regularity of meeting, and acts of quorum.....	254
—— individual liability, when penal.....	61
—— pleading in action on debt of.....	69
—— elections in: and the right of voting on stock irregularly issued..	361
—— citizenship of, when entitles to removal of the cause.....	357

	PAGE
<i>Costs</i> —what are allowed upon appeal from a county court and justice's court.....	292
—— on discontinuance: on appeal from order refusing discontinuance.....	466
—— on ordering new trial in equity suit. Are not chargeable on appellant.....	466
—— in the city court of Brooklyn.....	132
<i>Court of sessions</i> —power of, to bail.....	204
<i>Courts of the State</i> —have not power to discharge enlisted soldiers.....	334
<i>Covenant</i> —not to build precludes erection of fence.....	308
<i>Creditors'</i> —suit against stockholders of corporation.....	69
—— not to be referred because involving long accounts.....	411
<i>Criminal law</i> —evidence of bad character of deceased on an indictment for homicide.....	148

D.

<i>Debt</i> —what is, within meaning of insolvent laws.....	261
<i>Demand before suit</i> —not necessary where goods sued for were delivered by mistake, and defendant took undue advantage of it without effort to rectify.....	409
<i>Discontinuance</i> —of litigated cause not allowed without costs, before trial.....	466
<i>Discovery</i> —of corporate books and papers, when ordered.....	413
<i>Divorce</i> —what constitutes a desertion.....	259

E.

<i>Election of remedies</i> —as between affirming a contract and suing for fraud..	261
<i>Enlismment of minor</i> —validity of, when reviewable upon <i>habeas corpus</i>	334
<i>Estoppel</i> —of party to suit, by allegations in former unsuccessful suit.....	186
<i>Evidence</i> —on the question of diligence in use of patented machine.....	134
—— admissibility of former decree as an adjudication.....	341
<i>Execution</i> —cannot be issued on justice's judgment, docketed in county clerk's office, except by the clerk.....	229
<i>Executors and administrators</i> —relative powers and liabilities of the executor of a deceased executor, and the administrator <i>de bonis non</i>	428

G.

<i>Guardian and ward</i> —will by ward in favor of his guardian, sustained...	279
<i>Guardian ad litem</i> —answer by, and judgment thereon, precludes objection to appointment.....	47

H.

<i>Habeas corpus</i> —not to be issued by state court to review enlistment of soldier.....	334
<i>Hudson river railroad</i> —enjoined from constructing branches in the city of New York.....	249

	PAGE
<i>Husband and wife</i> —right of wife to recover for personal property lost by carrier.....	220

I.

<i>Imprisonment</i> —remedy of debtor, in case of neglect to charge him in execution.....	295
<i>Individual liability</i> —of officers of corporation and of stockholders.....	61, 69
<i>Injunction</i> —to stay summary proceedings, when not granted.....	58
—— against officers of a municipal corporation.....	29
—— against erection of fence in violation of covenant not to build....	308
—— does not lie to oust officers of a corporation.....	289
—— in suit brought by public officer, though abated by the expiration of his term, is not to be disregarded until vacated.....	315
—— against infringement of trademark may issue against those who sell, and those who make, in one action.....	459
—— against Board of Health.....	193
—— against construction of rail road interfering with another road....	249
—— action for, will not lie to restrain the collection of a tax.....	233
—— not granted to stay public work because it impairs an easement...	415
<i>Issues</i> —new trial of, when granted.....	385
<i>Interpretation</i> —of wills. “Thirds”.....	418

J.

<i>Judgments</i> —against the city of New York, and execution thereon.....	95
—— on appeal from surrogate, conclusive in other courts.....	121
—— form of, in an action for an accounting between partners.....	375
—— language of, construed by the report on which it was entered....	322
—— not set aside because it includes costs, without notice of taxation.	354
—— cannot be revived or renewed without order of court.....	229
<i>Jurisdiction</i> —of petition by religious corporation, for leave to sell real estate.....	254
—— of action against officers of foreign corporation.....	61
—— of equity, to interfere against exercise of eminent domain, impairing an easement.....	415

M.

<i>Mandamus</i> —mode of proceeding on against county.....	78
—— in what cases may be granted to compel municipal corporation to execute a contract or pay a debt.....	315
—— not the proper remedy to test claim to office of president of a board of public officers.....	348
—— application for, not an action, but a motion.....	78
—— the proper remedy to correct assessments.....	293
<i>Married woman</i> —may be sued for negligence of servant employed in her separate business.....	455
<i>Mechanics' lien</i> —can only be discharged in modes specified by statute....	264

	PAGE
<i>Mistake</i> —what is sufficient cause for reforming contract, in equity.....	466
<i>Mitigating circumstances</i> —what are, in an action for libel.....	97
<i>Motion</i> —for new trial, how determined, in equitable actions.....	385
—— for new trial on the ground of newly discovered evidence, how made.....	104
—— in what cases may be renewed.....	112
—— for new trial not granted after judgment.....	175
—— for discovery and inspection, how made.....	418
<i>Municipal corporation</i> —validity of contracts by.....	29

N.

<i>Negligence</i> —cause of action for, and what negligence of the plaintiff precludes a recovery.....	241
<i>New trial</i> —what errors are ground for, in equitable actions.....	385
—— in respect to challenges.....	407
—— when may be granted for newly discovered evidence.....	104
—— time of making motion for.....	175
—— may be granted, although objection was not taken at the trial in the court below.....	377
<i>New York city</i> —validity of statute relating to vacancies in Croton aqueduct department.....	348
—— contracts not authorized by the act of 1866.....	29
—— effect of chamberlain designating bank as a depository of public funds.....	93
<i>Notice</i> —requisites of, in attachment proceedings.....	272

O.

<i>Officers</i> —of court, when estopped by declarations.....	186
—— not to be ousted from office by injunction.....	289
<i>Orders</i> —staying proceedings until decision of appeal.....	354
—— in what cases reconsidered, or leave granted to renew motion....	112
—— of court, when to be deemed <i>res adjudicata</i>	1
—— need not recite proof of facts.....	47
—— for new trial, in equity cause, should not award costs.....	406

P.

<i>Parties</i> —action for negligence of married woman's servant, employed in her separate business, to be against her, and not her husband.....	455
—— action to enjoin infringement of trade-mark, may be against those who sell, as well as those who make.....	459
—— executor of executor may be sued in representative capacity by administrator <i>de bonis non</i>	428
—— in action relative to assets of business done in name of a clerk....	88
—— married woman may recover for her baggage lost by carrier.....	220
—— husband cannot maintain action founded on a tort of his wife....	377
—— neglect to serve, when reason for refusing reference.....	297

	PAGE
<i>Partnership</i> —dissolvable by implied notice.....	575
<i>Penalty</i> —what liability of corporations and officers is penal.....	61
<i>Petition</i> —in what cases proper; and effect of decision, and leave to re- new.....	1
<i>Pleading</i> —contract of corporation.....	69
—— impossibility of performance of condition.....	167
—— complaint may be attacked upon demurrer to answer.....	365
<i>Police justice</i> —may issue warrant against absconding husband and father.....	83
<i>Principal and surety</i> —cause of action as to.....	211

R.

<i>Re-argument</i> —not to be allowed by judges other than those who decided the cause.....	134
<i>Receivership</i> —of business and good will.....	385
<i>Reference</i> —actions for damages, though involving many items, not refer- able.....	266
—— in what cases an action will be referred on the ground of its involv- ing the examination of a long account....	296
—— not ordered on issue of fraud, though long account be involved...	411
<i>Re-hearing</i> —of motions, when not proper.....	1
<i>Religious corporations</i> —regularity of proceedings for the sale of their real estate.....	254
<i>Removal of causes</i> —from a State court to a court of the United States.	357, 361
<i>Removal</i> —and substitution of trustees.....	1
<i>Res adjudicata</i> —decision of petition in special proceeding is.....	1

S.

<i>Service</i> —by publication and mailing, how to be made.....	47, 57
<i>Set-off</i> —of premium note against claim upon receiver of insolvent insur- ance company.....	365
<i>Specific performance</i> —of contract for sale of lands, after payment by pur- chaser.....	224
<i>Stay</i> —of proceedings until decision of appeal is terminated when decision is announced.....	354
—— on appeal, in a case where business and assets to be sold are in re- ceiver's hands.....	385
<i>Stipulation</i> —to revive judgment is ineffectual without order of court....	229
<i>Subscription</i> —of summons may be printed.....	47
<i>Summons</i> —printed signature of, valid.....	47
<i>Supervisors</i> —powers of, in auditing claims: and when mandamus lies....	78
<i>Surrogate</i> —when may require accounting, and of what claims.....	121

T.

<i>Trademarks</i> —grounds of protection in case of newspaper names: who may be joined as defendants.....	459
--	-----

INDEX.

xiii

PAGE

<i>Trial</i> —challenge of jurors for preconceived opinion.....	407
—— objection to evidence must be specific.....	341
<i>Trusts and trustees</i> —proceedings for the removal and substitution of trustees.....	1

W.

<i>Warrant</i> —against absconding husband or father.....	83
<i>Will</i> —valid, although made in favor of guardian.....	279
—— effect of bequest subject to dower and “ thirds”.....	418

ABBOTTS'
PRACTICE REPORTS.
NEW-YORK.

NEW SERIES.

LIVINGSTON'S PETITION.

Court of Appeals ; June Term, 1866.

TRUSTS AND TRUSTEES.—REMOVAL AND SUBSTITUTION.—PETITIONS.—RE-HEARING OF MOTIONS.—RES ADJUDICATA.—
COMPROMISE BY GUARDIAN OF INFANTS.—ORDERS
OF COURT.—APPEAL TO THE COURT OF APPEALS
IN SPECIAL PROCEEDINGS.

As against the creator of a trust, under a trust deed securing to the grantor the rents, issues and profits of real estate, during life, with remainder over, the court will not interfere in behalf of the remainder men to give them more than is secured to them by the very terms of the settlement.

Those claiming, in remainder, under such a trust deed, are interested in the management of the trust estate, and may have an injunction to prevent waste calculated to injure or destroy the estate in remainder; but the creator of the trust is the only person who is interested in the *execution* of the *express trusts* therein mentioned.

The statute does not authorize a proceeding *by petition*, at the instance of those entitled in remainder, to remove a trustee of an *express trust* for receiving rents and profits and applying them to the use of any person for life, and against the wishes of such *cestui que trust*.

As a general rule, petitions can only be presented in an action pending, or
N. S.—VOL. II.—1.

Livingston's Petition.

in a matter over which the court has jurisdiction by some act of the legislature, or other special authority.

The statute authorizing any person interested in the execution of express trusts to apply for the removal of a trustee on petition, was only intended to embrace that class of persons who are *immediately interested*, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee.

The supreme court should not entertain a petition for the removal of a trustee, except upon the application of the person interested in the execution of the trust.

Where the evidence, on such a petition, tends to show that the deed of trust was obtained by fraud and undue influence, from a person of weak and unsound mind, it is the duty of the court to dismiss the petition for the removal of the trustee, unless the judge is fully satisfied that the trust deed was the voluntary act of a sane man, competent to make it.

Assuming, however, that the grantor was competent to create the trust, and that the deed is valid, the court ought not to remove the trustee against the wishes of the creator of the trust.

An order, made upon motion in a special proceeding, is not a proper subject for a re-hearing.

It is questionable whether a re-hearing upon the merits in a special proceeding, can be granted since the Code of Procedure, except upon an appeal to the general term.

The power to grant a re-hearing cannot be arbitrarily exercised; and if the judge grants it upon insufficient grounds, it is an error which the appellate court will correct.

The practice of one judge re-hearing a matter decided by another judge, condemned.

An order made upon petition, in a special proceeding, may be regarded as *res adjudicata*; and the petition cannot be reviewed before another judge.*

*The decision of a mere motion in an action has not been usually regarded as *res adjudicata*, except where the second application is made without having leave to renew. *Banks v. American Tract Society*, 4 *Sandf. Ch.*, 438; *Snyder v. White*, 6 *How. Pr.*, 521; *Van Rensselaer v. Sheriff of Albany*, 1 *Cow.*, 501. Compare, however, *Peet v. Cowenhoven*, 14 *Abb. Pr.*, 56; *Pattison v. Bacon*, 12 *Id.*, 142.

It is well settled that the decision on such a special proceeding as *habeas corpus* is to be regarded as *res adjudicata* (*Mercein v. People*, 25 *Wend.*, 64; *People v. Burtnett*, 13 *Abb. Pr.*, 8); except where new facts are involved in the second application (*People v. Kelly*, 1 *Abb. Pr. N. S.*, 435).

In the case of *CAUJOLLE v. FERRIE* (in the *Circuit Court of the United States* for the second circuit, held in the Southern District of New York, November, 1864), it was *Held*, that the decision of a surrogate on a contest for appointment as administrator, determining in favor of one party as be-

 Livingston's Petition.

A settlement of litigation, made by the guardian of infants, which is clearly just, and advantageous to the infants, is binding upon them, and a court of equity will enforce it, if clearly made for their benefit.

The practice of amending and ante-dating orders, in a peculiar case, discussed and condemned.

Where it was evident that an order removing a trustee was not promulgated until a certain date;—*Held*, that such order could not take effect prior to that time, by force of *another order*, made afterwards.

Under the provisions of the *Laws of 1854*, 592, § 1; and the *Code of Procedure*, §§ 1, 330, an appeal lies to the court of appeals, from an order made by the court below, on petition in a special proceeding,—*e. g.*, an order removing a trustee.

In such a case, the court of appeals will examine the affidavits and evidence upon which the case was decided below. An unrestricted appeal takes with it the whole merits of the determination appealed from.

Although the court of appeals will not review the discretion exercised by the court below, where it has acted within the statute, it may do so where the court below has proceeded upon the application of parties not entitled to invoke its interference.

When one judge of the supreme court overrules the decision of another judge, under pretext of a re-hearing upon substantially the same state of facts, and when orders are made subsequent thereto, by which a valid

ing next of kin, is not conclusive as an adjudication of the question of next of kin in a suit in equity in another court between the same parties for an accounting and distribution.

The action was brought by Benoit Julien Caujolle and others against John P. Ferrie and Cyrus Curtis, administrators of Jeanne De Lux. Previous proceedings had in this case are reported in 4 *Bradf.*, 28,—where the decision of the surrogate referred to below is stated. That decision was affirmed on appeal in 26 *Barb.*, 177; and again in 23 *N. Y.*, 90.

NELSON, C. J.—This bill is filed by the complainants, who are French aliens, against the defendants, administrators of the estate of Jeanne De Lux, for distribution, claiming to be the next of kin to the deceased. The estate is large, some seventy thousand dollars, which is principally invested in bonds and mortgages upon property in this State.

The question in the case arises upon a plea to the bill of complaint, which sets up in bar of the suit the adjudication of the surrogate's court in favor of Ferrie, one of the defendants, as the person next of kin, on contestation between him and the complainants, in the granting of letters of administration. No cases have been referred to, nor am I aware of any in this State, or indeed, in any of our sister States, adjudging the point in question. Different opinions seem to be entertained by eminent judges in England as to the conclusiveness of the decision of the ecclesiastical court on a question of administration, upon a court of equity in a suit for distribution,—as may be seen from the case of *Barrs v. Jackson*, decided by Vice-Chancellor KNIGHT BRUCE in 1842 (1 *Younge & Coll.*, 585), and the case on appeal (1 *Phillips*,

Livingston's Petition.

settlement and final discontinuance of the proceedings are avoided, upon grounds not only false in fact, but insufficient in substance, the case involves a principle which affects the administration of justice in this State, and presents a case eminently proper to come before the court of appeals for review.

In such a case, the proceeding being of an equitable nature, the court of appeals have power to examine the whole case upon the merits, and to make such final order in the premises as it shall deem suitable and proper, in view of all the circumstances.

The rules and practice of the court have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community, and a departure from them may be ground for reversing an order appealed from.

Appeals from orders.

This proceeding arose in the supreme court in the first district, upon the petition of Mortimer Livingston and Henry W. Livingston, infants, by John Livingston, their guardian, for the removal of Daniel C. Birdsall from the office of trustee under the trust deed of William Winter.

582). The opinion of Lord LYNTHURST on the appeal may, perhaps, be regarded as settling the question in England in favor of the conclusiveness of the adjudication of the ecclesiastical court, though that may be doubted. It is not material, however, to go into this inquiry, for, admitting it to be so, the decision could not be allowed as controlling the question—presented under our system of administration. We regard the question of next of kin under our system, as preliminary and incidental before the surrogate, and made simply with a view to ascertain the proper person, as prescribed by the statute, to be admitted to letters of administration. This is the sole purpose and object of the inquiry; and without any reference to or consideration of the question of distribution. This question arising out of the admission to letters of administration, is of much less importance, and an error in the proceedings much less prejudicial in its consequence than the question involving the distribution of the estate. If a competent person is appointed in the former case to administer upon the assets, though he may not be the right person, the interests of all concerned may be safe. But in the latter the right of property in the assets is concluded. Hence the right of letters of administration is not usually severely contested. We may add, also, that the surrogate is not concluded by his own adjudication in the matter. He may revoke the appointment for imposition or fraud, or displace the administrator for errors, and appoint another.

The plea, therefore, in this case must be overruled, and the defendants have leave to answer.

Livingston's Petition.

On the 27th day of February, 1862, Gabriel Winter died intestate, seized of real estate situate in the counties of New York and Queens, of the value of two hundred thousand dollars, and personal estate of the value of twenty-five thousand dollars, leaving him surviving, his widow, Jane Winter (who died April 19th, 1862), and William Winter, his son, and Mortimer Livingston and Henry W. Livingston, his grandchildren, by his daughter Mary Jane (who died March 29th, 1858), his only heirs.

Letters of administration were taken out May 21st, 1862, by his son William Winter, with whom was joined John Livingston, the father of the above-named Mortimer and Henry W. Livingston, who are infants.

All the property and papers belonging to the estate, as well as the business thereof, was taken into the charge and possession of John Livingston; and he proceeded to collect the rents, made the repairs, paid the taxes, made insurances, and (as he says) exercised general supervision and control over the same; except as to the sum of five thousand eight hundred and seventeen dollars and sixteen cents, belonging to the estate, which was deposited with the United States Trust Company, to be drawn out only on their joint checks.

Afterwards, and on the 20th day of January, 1863, upon the application of John Livingston as guardian for his children, a *commission de lunatico inquirendo* was issued out of the supreme court, directed to three commissioners to inquire into the alleged unsoundness of mind of William Winter. The commission was duly executed, and a verdict rendered that William Winter was not of unsound mind. Upon application to the court, this verdict was confirmed October 17th, 1863, although two of the commissioners certified that they thought the verdict was erroneous.

Livingston thereupon took measures to obtain a trust deed, still believing (as he says) that William was wholly incompetent to manage his own affairs, in consequence of his well-known weakness of mind and credulity; and that the only practical mode remaining to secure William against want, by saving to his own use his real estate, was by obtaining the execution of a trust deed under the statute. On the fourth day of December, 1863, Livingston delivered to Daniel C. Birdsall, who had been

Livingston's Petition.

the attorney of William Winter, an engrossed copy of the proposed trust deed, leaving the name of the proposed trustee a blank. Birdsall returned it unexecuted; and then another was drawn up, making some alterations, and naming Daniel C. Birdsall as trustee. After Mr. Winter had taken counsel of Judge EDMONDS, and on the 23rd day of December, 1863, a trust deed was formally executed to Daniel C. Birdsall as trustee. The circumstances under which it was executed are noticed more at large in the opinion of the court.

The trust deed, after the formal parts, proceeded as follows: "That said William Winter, for and in consideration of the "sum of one dollar, lawful money of the United States, * * "and for settling and granting all his right, title and interest "in, and to all and singular, the real estate and property hereinafter mentioned, upon the trusts and for the purposes hereinafter expressed and declared, hath granted, bargained, sold, "aliened, remised, released, conveyed and confirmed, and by "these presents doth grant, bargain, sell, alien, remise, release, "convey and confirm unto the said party of the second part, all "the claim, right, title and interest of him, the said William "Winter, of, in and to the equal undivided half-part of the following described real estate" (here follows a description of the same), "together with all and singular the tenements hereditaments and appurtenances thereunto belonging, or in any "wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, * * * "to have and to hold all singular the said hereinbefore granted, "mentioned and described real estate and property, with the "appurtenances, unto the said party of the second part, his successors and assigns. Upon trust to receive the rents and "profits, and to apply such rents and profits thereof to the use "of him, the said William Winter, during the term of his natural life, and upon the death of the said William Winter, to "assign, transfer and convey, all and singular, the real estate "and property hereinbefore mentioned, described and conveyed in manner following, that is to say, to the lawful issue "of said William Winter living at the time of his death, according to the rules prescribed by the statute regulating the "descent of real property; and in case of said William Winter "dying without leaving him surviving any such lawful issue,

Livingston's Petition.

“ then, upon the further trust, to assign, transfer and convey, all “ and singular, the said real estate and property to his nephews “ now living.” Its other provisions are not material.

After the execution of the trust deed Livingston says that Birdsall proposed to him to permit him to take possession of one half of the real estate, and on the 29th of January, 1864, he brought to Livingston for execution a proposed agreement for that purpose, which Livingston declined, on account of his distrust of Birdsall, fearing that the only design of Birdsall was to involve the estate in litigation and expense, and that he would manage in such manner with reference to William Winter, as to deprive him of his property. Said Livingston (as he himself says) finally declined to put Birdsall in possession of any such real estate, and declined to join with him in the execution of any lease or leases thereof, so that he is not now (June 4th, 1864), and never has been, in possession of said real estate, or of any part thereof, and has never paid anything for taxes, insurances or repairs thereon; that on one occasion he paid to a painter the sum of one hundred and sixty-seven dollars and fifty cents, for account of painting, which Livingston had therefore caused to be done.

Birdsall, being dissatisfied with this condition of things, and having, as he alleges, been refused moneys which properly belonged to him under the deed of trust, on the 30th day of May, 1864, commenced a suit against Livingston's children, in partition, to divide the real estate; and obtained an injunction order restraining Livingston from collecting any of the rents of such estate.

On the fourth day of June, thereafter, Livingston as guardian of his infant children, on his petition papers and affidavits, obtained from Justice J. F. BARNARD, an order to show cause before the special term to be held at chambers in the city of New York, on the thirteenth, why Birdsall should not be removed as trustee, and some other person appointed to execute the trusts therein named.

The order provided that in the meantime, and until the further order of the court, Birdsall should refrain from collecting any of the rents, or in any manner interfering with the trust property.

The hearing was finally set down for the twenty-ninth of

Livingston's Petition.

June, with leave to serve additional papers until the twenty-fifth. On the first day of July, this petition, after a hearing by Justice LEONARD, holding the special term, was denied upon the merits.

Livingston appealed to the general term: but afterwards countermanded his appeal, having on the fifteenth day of July following, obtained an order from Justice G. G. BARNARD at a special term, to show cause before the court at special term in the City Hall on the third Monday of July, why the petitioners should not have leave to renew their application for the removal of Daniel C. Birdsall, from the office of such trustee, under the trust deed of said William Winter, and to apply for the appointment of Daniel Devlin, city chamberlain of the city of New York, as such trustee.

This motion came on before the same justice, at special term at the City Hall on the first day of August, and after argument, was granted, and it was further ordered that such application be heard on the eighth day of August, at eleven o'clock, in the forenoon, before the special term to be held at the City Hall.

In pursuance of this direction, the application was renewed before the special term, then held by Justice JOSEPH F. BARNARD, who took the papers without rendering a decision at the time.

Prior to the order granting leave to renew the application, a receiver had been appointed in the partition suit: and neither Livingston or Birdsall were permitted to possess themselves of the rents of the real estate.

On the third of October, 1864, and before any decision had been promulgated by Justice BARNARD upon the second application or re-hearing, the parties came together and effected a settlement.

On that day an agreement was made, and entered into between William Winter of the first part, and Daniel C. Birdsall of the second part, and John Livingston guardian of his children of the third part, to perfect such settlements: which was duly executed under their respective hands and seals, and which recited that the above mentioned William Winter, Mortimer Livingston, and Henry W. Livingston, were theretofore seized in fee simple, as tenants in common of all the house, lots and real estate, mentioned in Schedules No 1 and 2 thereto annexed, and theretofore owned by Gabriel Winter, their common ances-

Livingston's Petition.

tor now deceased, and while so seized, the said William Winter made and executed to the above named Daniel C. Birdsall a deed and conveyance in fee of his one equal undivided half of his said houses, lots and real estate, *in trust, &c.*, (as stated in the trust deed). And that whereas, since the execution of the said deed of trust, the said parties of the first and second part, have brought an action in the supreme court of the State of New York, against the said John Livingston, Mortimer Livingston and Henry W. Livingston, for the partition among said tenants in common of said houses, lots and real estate; in which action a receiver of the rents, issues and profits of said houses, lots and real estate has been appointed by said supreme court: and which said receiver is now in the receipt of said rents and profits: and whereas the said houses, and lots, and real estate are so situated, that it is best for the interest of all parties concerned, that partition thereof should not now be made, and that the parties interested in the receipt and enjoyment of said rents, issues and profits, should not be subjected to the losses and expenses necessarily consequent upon a receivership of the same, and that each party entitled thereto should have and enjoy the leasing, care and custody of his or their portion of said houses, lots and real estate and the collection and receipt of the rents, issues and profits thereof: and whereas a mutual compromise and agreement of all said matters has been made by and between the said William Winter and the said John Livingston as guardian as aforesaid: (The agreement then proceeded as follows):

Now, therefore, this agreement witnesseth, that from and after the day of the date hereof, the said Daniel C. Birdsall, as assignee and trustee of William Winter as aforesaid, shall have and enjoy the exclusive rights of letting and leasing the several houses, lots, and real estate, particularly mentioned and described in Schedule No. 1, to this indenture annexed, and of collecting and receiving the rents, issues, and profits thereof.

The agreement then makes a similar provision in favor of Livingston as to the houses, lots, and real estate in Schedule No. 2. It then provides that all the leases shall be in their joint names, and that no lease shall be given by either of the parties for a longer term than one year, without the express consent of both in writing, duly acknowledged. Settlements

Livingston's Petition.

were to be made on the first day of January and July, in each year, when an account was to be rendered, and a balance struck, and balance paid so as to make each one's receipts of nett proceeds for the half year equal to the others'.

Birdsall and Livingston further agreed that each should keep the buildings properly insured at all times, and promptly pay all taxes and water rates on the buildings, assigned to them respectively by Schedules No. 1 and 2, and also should "Keep all parts and portion of said premises in proper and suitable repair, and defray all expenses of so doing," but neither, however, to exceed two thousand dollars in any one half year without the written consent of the other. The insurance to be effected in their joint names. One party could not interfere in the collection of the rents assigned by said agreement to the other; but each party was to have the exclusive control and management of the premises assigned to him by said agreement, except as therein otherwise provided. The agreement was to continue in force during the trust, and no action or other proceeding of any kind to obtain any further partition should at any time be prosecuted by either of the parties. It was made a condition of the said agreement that Livingston should not at any time thereafter by suit or proceedings at law, or in any other way, interfere with or molest William Winter or his person, or his residence, or attempt in any way directly or indirectly to control, or influence, or direct him in respect to his residence, personal movements, or expenditures. And it was mutually covenanted that except as provided in said agreement, Birdsall and Livingston should not be liable to account to each other of, and concerning the rents and profits of said property during the life of William Winter, and that neither Birdsall or his successor in the trusteeship should be molested or interfered with by action, or otherwise, by said party of the third part, except to compel due execution and performance of such agreement.

After this agreement was duly executed and acknowledged by all the parties thereto, and on the same day, a stipulation in writing was entered into, signed by *Daniel C. Birdsall*, trustee, *William Winter*, and *John Livingston*, guardian, for infant petitioners, and *Samuel G. Courtney*, attorney for Bird-

Livingston's Petition.

sall, and Winter, by which it was agreed by and between all the parties thereto, *that each and any order made in the matter of the application of said infants, by John Livingston, their guardian, for the removal of Daniel C. Birdsall, from the office of trustee, be vacated*, and that an order to that effect might be entered by any of the parties, and *that all the proceedings therein be discontinued* without costs to any of said parties as against the others ; and that an order to that effect might be entered by either party : and that the injunction order granted them on the eighth of August, 1864, be vacated, and dissolved.

On the next day, at a special term held before Justice LEONARD, at the City Hall, in New York—on filing the stipulation, and on motion of John W. Edmonds, for the petitioners, an order was entered in pursuance of the stipulation vacating *each and every order in said proceedings, and discontinuing the said proceedings without costs to any of said parties as against the others* : and dissolving the injunction.

Here the matter rested ; and the parties went on under their agreement of October third, 1864, until the twelfth day of April, 1865 ; at which time Justice JOSEPH F. BARNARD published his decision ; and an order was entered with the clerk of New York, removing Daniel C. Birdsall, as trustee of William Winter, and appointing John B. Haskin in his place and stead upon his filing a bond in the penalty of twenty thousand dollars, with sureties to be approved by a justice of the supreme court.

On the twenty-fourth day of April, 1864, John B. Haskin having executed the required bond, applied to Justice GEORGE G. BARNARD for an order requiring Birdsall to account as trustee and pass his account before a referee in the usual manner ; upon which occasion the said justice granted an order that said Birdsall show cause before him at the chambers of the supreme court in the City Hall, on the twenty-sixth of April why such an order should not be made.

On the twenty-sixth of April the said justice at a special term granted the order, no one appearing to oppose it ; and he further directed that the tenants of the premises in Schedule No 1 account and pay all the rents to said John B. Haskin, and attorn to him as such trustee.

Livingston's Petition.

On the eighth day of May, 1865, Birdsall applied to Justice SUTHERLAND and obtained an order upon Livingston and John B. Haskin, to show cause before the court at a special term to be held in the City Hall on the fifteenth day of May, then instant, why the order of the twelfth of April removing him as trustee should not be vacated and set aside, on the ground that the proceedings in said application had been *settled and discontinued*; also, why the above order of the twenty-sixth of April should not be vacated for the same reason; and in the meantime staying the proceedings of Livingston and Haskin under said orders.

On the next day, May 9, 1865, John B. Haskin obtained an order from Justice JOSEPH F. BARNARD, dated at Poughkeepsie, requiring Birdsall to show cause before him at a special term to be held at his chambers in Poughkeepsie, on the thirteenth day of May, then instant, why the caption of the order of April twelfth, removing Birdsall as trustee, should not be amended so as to read the day of the actual making thereof, to wit: The day of August, 1864, *nunc pro tunc*, and stand as the order of the court, of the last mentioned date.

And on the thirteenth the said justice at a special term held at the court house in Poughkeepsie, *granted the motion*, and directed the order of April 12, 1865, to be "amended so that the date thereof shall be entered (now for then) as of the last mentioned date, being the day of the rendition of the decision in this matter and of the making of said order." This order was granted on motion of John B. Haskin, no one appearing to oppose it.

On the twenty-seventh day of May, 1865, on application of John B. Haskin, Justice SUTHERLAND granted an order on Birdsall to show cause at a special term in the City Hall, New York, on the thirteenth day of May, then instant, *why the order of Justice LEONARD discontinuing the proceedings* bearing date October 4, 1864, should not be *set aside and vacated*.

On the seventeenth day of June, 1865, Justice SUTHERLAND at a special term *denied the motion of Birdsall* to vacate the order of the twelfth of April as amended by the subsequent order of May 13, whereby said Birdsall was removed as trustee. *He also denied the motion to vacate the order of April 26,*

Livingston's Petition.

whereby Birdsall was directed to state his accounts as such trustee. And on the same day *he granted the motion of Haskin, whereby the order of discontinuance granted by Justice LEONARD was directed to be vacated and annulled: no costs were allowed to either party.*

Birdsall and Winter appealed to the general term from the order of Justice JOSEPH F. BARNARD of April 12, 1865, removing Birdsall as trustee. Also from his order of May 13, 1865, directing his former order to be amended and *entered nunc pro tunc*, as of August thirty-first. Also from the two orders of Justice SUTHERLAND of June 17, 1865, one of which denied the motion to vacate the two orders of Justices J. F. and Geo. G. BARNARD, removing Birdsall as trustee, and requiring Birdsall to account for Haskin as the substituted trustee: *and the other of which annulled and vacated the order of discontinuance granted by Justice LEONARD.*

All these appeals were heard at the same general term in the city of New York; and the orders appealed from affirmed with costs.

Upon the appeal to the court of appeals, an application was made at the March term in behalf of the appellants, for a stay of proceedings pending the appeal; which was granted with a direction that in the mean time *William Winter, the beneficial owner of the rents and profits of the trust estate, be allowed to collect the rents for himself:* and with liberty to the respondents to bring on the appeals for argument at the succeeding June term.

The nature and character of the evidence upon the application of the Livingstons to remove Birdsall as trustee, together with the circumstances under which a re-hearing was granted, and the subsequent orders made, so far as they are material, sufficiently appear in the opinion of the court.

William F. Allen and Alexander S. Johnson, for the appellants.

John W. Edmonds, for the respondents.

John H. Reynolds, for Haskin.

Livingston's Petition.

MORGAN, J.—It is important to a proper consideration of the several questions presented by these appeals, to understand the position which the respective parties occupy towards each other, and the equity of each to invoke the aid of the courts under the trust deed, for the protection of their respective rights.

This trust deed was voluntary on the part of William Winter, securing to himself the rents, issues and profits of a real estate, confessedly worth one hundred thousand (\$100,000) dollars during his life, with remainder over to his heirs: and on default of heirs to his nephews, *Mortimer and Henry W. Livingston*. As he has no children, it may perhaps be assumed that the nephews in question take a vested remainder under our statute: which doubtless gives them a standing in court to invoke its aid to protect the *corpus* of the estate from destruction, by the unlawful acts of the tenant for life.

So far as the deed creates a trust in Birdsall to receive the rents and profits, and apply them to the use of William Winter during his life, it is expressly authorized by statute (1 *Rev. Stat.*, 729, § 55). So far as it requires the trustee to assign or convey the legal estate to those who shall be entitled in remainder under the trust deed, his services will be useless: as the transfer will be made, if at all, by operation of the statute of uses, and his office as trustee will then terminate (1 *Rev. Stat.*, 730, § 67).

As against William Winter, the creator of the trust and the beneficial owner of the rents, issues and profits of the legal estate, during his life, the court will not, I think, interfere in behalf of his nephews, to give them more than is secured to them by the very terms of the settlement (*Hill on T.*, 83; *Hays v. Kershaw*, 1 *Sandf. Ch.*, 258). Although the deed of settlement is silent on the subject, doubtless those claiming in remainder under it are interested in the management of the estate: and the tenant for life owes them certain duties which a court of equity may enforce. A tenant for life in respect to these duties stands in the nature of a trustee to the remainder: but this is an implied, and not an *express trust* (*Joyce v. Gunnels*, 2 *Rich. Eq.*, 259).

If the tenant for life is guilty of any species of waste calculated materially to injure or destroy the value of the estate in remainder, it is perfectly competent, and in truth is the constant practice, in this country as well as England, for the re-

Livingston's Petition.

remainder man to resort to the prompt and efficacious remedy by an injunction bill (4 *Kent*, 77). Upon such a bill, a court of equity might require security of the trustee for the due performance of those duties which the law casts upon him in respect to the preservation of the *corpus* of the trust estate.

Since it has become impossible under our statute (1 *Rev. Stat.*, 730, § 65) for the trustee in such a case to alien or dispose of the real estate to the injury of the remainder man, there are but few occasions when it can be necessary or proper for the court to interfere with the management of the trust, except on behalf of the beneficial owner for life.

In this case, William Winter, the creator of the trust deed, is the only person who is legally interested in the execution of the *express trusts*, therein mentioned.

There are no express trusts in favor of the petitioners. The obligation on the part of the trustee to preserve the *corpus* of the estate for the benefit of those entitled in remainder, does not rest upon any *express trusts*, but is to be implied, if it exists at all.

Keeping in view the relations which these several persons sustain towards each other, I will now proceed to notice the several questions presented by the appeals.

I. It will be seen that *William Winter*, the equitable owner of the estate for life, and who alone is interested in the execution of the trusts mentioned in the deed of trusts, is a *party defendant* in these proceedings. I am not aware of any case where the court has entertained a petition for the removal of a trustee, under our statutes, at the instance of those entitled in remainder, and against the wishes of the *cestui que trust* for life. Nor do I think the statute intended to authorize such a proceeding. Section 55 (1 *Rev. Stat.*, 723), authorizes the creation of an express trust "to receive the rents and profits of lands, and apply them to the use of any person during the life of such person."

This is such a trust. Section 70, taken in connection with section 72, provides that upon the bill or petition of any person *interested* in the execution of an *express* trust theretofore authorized, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or who shall for any cause be deemed an

Livingston's Petition.

unsuitable person to execute the trust. It was said by the chancellor in the matter of Van Wyck (1 *Barb. Ch.*, 565), that independently of these statutory provisions, the court had no power upon a mere petition to discharge a trustee, and that the usual course of proceedings was by bill (and see *Hill on T.*, 194).

As a general rule petitions can only be presented in an action already commenced, or in a matter over which the court has jurisdiction by some act of the legislature, or other special authority. Under the English statutes, sundry cases of trust were provided for, in which a remedy might be had by petition; but the courts uniformly held that the remedy could not be extended by construction to include other cases. In *Ex parte Brown* (*C. Cooper*, 295,) Lord ELDON discharged an order that had been made upon petition, stating that in his opinion, *constructive* trusts were not within the meaning of the statute.

And in *Ex parte Skinner* (2 *Mer.*, 453), it was held that the statute was meant to extend only to cases of plain breach of trust, committed in the character of trustees (and see *Hill on T.*, 193; 3 *Dan. Ch. Pr.*, 2099).

It is quite certain that our statute authorizing any persons interested in the execution of express trusts to apply for the removal of the trustee upon petition, was only intended to embrace that class of persons who were immediately interested, and who might be injured by a violation of the trust, or by the insolvency, or other incompetency of the trustee.

In this case, I think William Winter was the only person interested in the execution of the trust, within the meaning of the statute; and that it was erroneous for the court below to entertain a petition for the removal of Birdsall from his trust, except upon the application of Winter. It does not, however, appear that the appellants took any objection of this character; perhaps they should have moved to dismiss the petition in order to avail themselves of the objection; and it may be too late after litigating the petition upon the merits to raise such a question. If, however, the court below was without jurisdiction in the first instance, as I am inclined to believe, I think it is not too late to raise the objection, although it is well settled that a stranger could not avail himself of it (*People v. Norton*, 9 *N. Y.* [5 *Seld.*], 176).

Livingston's Petition.

II. If it should be conceded that the proceedings by petition were regular, or that jurisdiction was acquired in consequence of the appellants neglecting to take the objection in time, then it will be necessary to examine into the matter of the petition, before we are prepared to pass upon the other question raised by the appeal. It contains a great many things which are quite foreign to the matter in hand, and many of its most important statements rest upon information and suspicion. It contains, however, one statement, which, if sustained by the evidence,—and I am not prepared to say that it is not,—would induce the court to refuse at once to entertain any proceedings to give effect to the trust deed in favor of these respondents, or any other of the parties claiming under it.

It is said in the petition that William Winter was incompetent to devise real estate. This is stated by Mr. Livingston in his letter to Judge EDMONDS but a few days before the execution of the trust deed. The petitioners also say “that said William Winter, being a person of very weak undersanding, incapable of transacting business or managing his own affairs; so credulous as to believe the most improbable and absurd statements, and so timid as to be easily frightened into almost any course of action that might be suggested to him; easily alarmed and imposed upon by any designing person, said Birdsall has taken advantage of William’s weakness of mind and character, and of his (Birdsall’s) own relations as such attorney and trustee towards him, for the purpose of defrauding, deceiving, and misleading him. *That at the time the execution of said trust deed of December 23, 1863, was obtained by Birdsall, * * * and for more than a month prior thereto, he had been acting not only as the agent, attorney, and counsel of William, but as his guardian, and custodian: that said Birdsall has abused the confidence reposed in him by William, solely for his own gain and advantage; that by falsehood, trickery, and deceit, he has induced and compelled William to avoid all communication with, and keep away from, his own relatives, acquaintances, and other advisors; whilst by like fabrications and false statements he has prevented such relatives from calling upon William, he (Birdsall) keeping himself in communication with, and deceiving both parties. * * * * That the execution of said trust deed was procured by Birdsall through fraud and deceit practised upon*

Livingston's Petition.

said William, and upon said Livingston. And his counsel, *Gilead B. Nash* (Livingston's partner), in his affidavit annexed to the petition says, that he never had any doubt of the fact that said William is a person of unsound mind."

It appears that Livingston himself proposed that Winter should execute a deed of trust, although he preferred somebody besides Birdsall for trustee. He finally assented to have Birdsall's name put in. "This, however," says Mr. Nash, "was a matter of necessity, for Mr. Birdsall repeatedly stated both to me and Livingston that he would not allow William to execute the deed unless it should be made to him."

"*William Winter*, however, in his affidavit states that he executed the trust deed without any compulsion, fraud, duress, threats, or misrepresentations of any kind upon the part of Birdsall or any other person; and that he is still satisfied with it, and with Birdsall as his trustee: that he selected Birdsall by his own choice, although Birdsall at the time informed him that he was comparatively speaking a poor man; that he made inquiries as to Birdsall's character and integrity, and became satisfied and is still satisfied that Birdsall will carry out the said trust deed with faithfulness and honesty. He further states that he executed the said trust deed, "believing it to be the best thing he could do to get away, and be relieved, from the annoyance and harassings of said Livingston, and believed that thereby he could have the quiet and rest from vexation he so much desired to have, and desires. Mr. Birdsall, in his affidavit, states that Livingston urged him to advise William Winter to make a trust deed: that Livingston offered him two thousand dollars for his trouble, if he would get him to execute such an instrument as he, Livingston, had proposed for him: that Livingston said he did not offer it as a bribe, but that William Winter was very close, and would not pay him, Birdsall, for his services. Birdsall says he declined this proposition. He says that Livingston told him frequently that he, Birdsall, ought to make from two to three thousand dollars a year out of the trust, and that he, Livingston, would not take charge of it for less than that sum.

That in the month of May, 1864, Livingston stated to him that it would be impossible for Birdsall and Livingston to get along together, and it would be better for all parties for Bird-

Livingston's Petition.

sall to resign his trust ; that Livingston offered him \$5,000 if he would resign, and \$5,000 more if he, Birdsall, would get him (Livingston), or some person, he, Livingston, would select, appointed trustee, the moment the order for such appointment was entered.

Birdsall says he declined, whereupon Livingston got angry, and swore he would have him removed, whatever it might cost. Mr. Livingston, in a subsequent affidavit, denies that he ever made any offer of the kind.

The case tends very strongly to show that the deed of trust was obtained by fraud and undue influence ; both Livingston and Birdsall co-operating together to induce William Winter to execute it : and as it is expressly charged in the petition that Winter was of unsound mind when it was executed, and that the deed was obtained from him by fraud and undue influence, it was clearly the duty of the court below to dismiss the petition, unless the judge was fully satisfied that the trust deed was the voluntary act of a sane man, competent to make it. A court of equity will never interfere in favor of a party who takes under an instrument executed by a person who is *non compos*, or which was executed under duress or under terror or apprehension : nor suffer such instruments to take effect if they are accompanied by any circumstances of imposition or apprehension (See *Hill on T.*, 156, *et seq.*).

In order therefore to sustain the orders made for the removal of Birdsall as trustee, and the appointment of Haskin to carry out the trusts, the petitioners must of necessity concede that *William Winter was not only competent to make the deed of trust, but that it was fairly and voluntarily made*, when he was neither under duress or restraint. Otherwise the court would doubtless set it aside on complaint of William Winter or of his committee.

III. Assuming, however, that William Winter was competent to create the trust, and that the deed is valid, there is but little left in the case, as made out by the petitioners, upon which to found an order for the removal of Birdsall as trustee. In my opinion the court ought not to remove him against the wishes of William Winter, who has an undoubted right to give away the rents and profits of the trust estate to whom he pleases, without interference from the petitioners. He may, if he pleases, pay

Livingston's Petition.

Birdsall's debts out of these same rents and profits: and it is not for Livingston to prevent him from doing so.

But it is claimed that William Winter is liable to be imposed upon: that he is an imbecile, and incompetent to manage for himself. Without undertaking to deny that this may be, in a measure true, what is the result? It does not advance the case of the petitioners, or aid in sustaining the proceedings in the court below. If the court erred in affirming the verdict of the jury, upon the *commission de lunatico inquirendo*, that error cannot be corrected in these proceedings. From the nature of the evidence tending to establish the lunacy of William Winter, there is no doubt that if he is now incompetent to manage his own affairs, he was equally so when he made the deed of trust; and this would lead to a result quite foreign to the expectations of the petitioners, who claim under it, as we have already had occasion to notice. Now, whether Birdsall is insolvent or not, whether he is using a portion of the rents and profits for his own benefit, and to pay his debts in order to relieve himself from insolvency, is a question between him and William Winter, and the creditors of William Winter. When the petitioners state that William Winter's debts are accumulating upon him by the negligence and dishonesty of the trustee, they are interfering with a matter over which they have no control whatever.

It will be time enough for Livingston to make such a complaint, when he is constituted one of the committee of the person and estate of William Winter: and until that time arrives, he has no claim upon the court, to interfere with William Winter or his trustees. As yet, William Winter has not been pronounced a lunatic, or a person of unsound mind, by the judgment of a competent court: and we must therefore, concede to him the same right we concede to others who are the owners of a large estate, the right to dispose of it by gift, grant, or devise, to whomsoever he pleases, without being called to account for it, in a court of equity, by those who have no legal control over him, or his estate. In my opinion, therefore, the order or decree of Justice LEONARD, of July 1, 1864, denying the application of the petitioners was right: First, upon the ground that the petitioners had no right to apply by petition for Birdsall's removal as trustee: and Secondly, *upon the merits*.

Livingston's Petition.

As the re-hearing before Justice JOSEPH F. BARNARD was substantially upon the same state of facts, it may not be necessary to proceed any further in the discussion of these appeals, as we must necessarily come to the conclusion that the subsequent decree removing Birdsall as trustee, and the appointment of Haskin in his place, cannot be sustained upon any theory of the case.

IV. As this is, however, a very extraordinary case, I will proceed to notice the proceedings, subsequent to the decree of Mr. Justice LEONARD dismissing the petition. The very statement of the case, with the various orders, made by the various judges during its progress to this court, is sufficient to attract our attention, and create some suspicions, at least, that the forms of law have been strangely perverted to accomplish objects which could not have been attained by the regular and orderly administration of justice.

I will first notice the order for a re-hearing, granted by Justice GEORGE G. BARNARD, at special term.

(1.) It is called an order *granting leave to the petitioners to renew their application*: but it is doubtless an order for a *re-hearing* of the petition upon the merits. With respect to applications made in an action, they may doubtless be made by petition as well as by motion, and the practice is the same, whichever form the application takes (1 *Barb. Ch. R.*, 578).

In relation to special proceedings authorized by the Code of Procedure, when the remedy may be had by petition, under section 1, the rules governing ordinary motions do not apply: but instead of obtaining leave to renew the application, the defeated party was required by the former practice of the court to apply for a re-hearing, in the same manner as upon a decree or order (1 *Barb. Ch. Pr.*, 353).

An order made upon motion, was not a proper subject for re-hearing; but might be discharged by application by motion to the court. But if the order of Justice G. G. BARNARD is treated as an order made on motion, I think it was made in violation of the practice of the court, and certainly in violation of rule 23, of the supreme court, which prohibits a second application upon the same state of facts to be made to any other judge, than the one who decided the original application.

(2.) It is at least questionable, whether a re-hearing upon the

Livingston's Petition.

merits can be granted, since the Code of Procedure, except upon an appeal to the general term. Doubtless the court at special term may, at any time within a year, relieve the party from a judgment, order, or other proceedings, taken against him through his mistake, inadvertence, surprise, or excusable neglect, upon terms, or grant a new trial in the cases provided for in civil actions, according to the rules and practice of the court. But there is no provision in the Code, that I am aware of, which, when the trial is by the court, authorizes an application to the court at special term for a new trial upon the merits. It may be said, however, that by another provision of the Code, in cases left unprovided for, the former practice may be resorted to (§ 468). Certainly the Code has not attempted to regulate the practice in special proceedings, except upon appeals. By the *Laws of 1854*, p. 592, certain provisions of the Code are made applicable to special proceedings. That act provides that an appeal may be taken to the general term, from the final order of the special term in special proceedings: and that the practice on such appeals shall be conformed to sections 322, 329, 330, 332, of the Code. By reference to these sections it will be seen that the appellate court may, upon such appeal, reverse, affirm, or *modify* the order appealed from, and may order a *new trial*. It is doubtful, I think, whether the court, at special term, can entertain an application for a new trial upon the merits, as that power seems to be vested in the court at general term.

V. But if the former practice is still in force, in respect to re-hearing in equity in this State, I am of the opinion that the court below erred in granting a re-hearing in this case. (1.) It was not a case for a re-hearing. A re-hearing will not be granted on account of the discovery of new evidence, or new matter, nor because the importance of the testimony has only been ascertained since the decision, nor to obtain cumulative testimony, nor for the purpose of contradicting the adverse party's witnesses (1 *Barb. Ch. Pr.*, 354-5, and cases cited). Certainly the power to grant a re-hearing cannot be arbitrarily exercised: and if the judge grants it upon insufficient grounds, it is an error, which should be and will be corrected by the appellate court, whenever the question is properly brought before it for review. (2.) But in my opinion there is another

Livingston's Petition.

grave objection to the order of Justice BARNARD, granting a re-hearing of the petition, except before the same judge who denied the original application. Chancellor WALWORTH, in *Winship v. Pitts* (3 *Paige*, 260), says that after an application has been made to the vice-chancellor in open court, and been denied by him, it is irregular to bring the same question before the chancellor, except by way of appeal; and after a decree has been made by the chancellor, it is not competent for any vice-chancellor to make an order or decree which would directly or indirectly discharge, alter, or modify the same (*Greenwich Bank v. Loomis*, 2 *Sandf. Ch.*, 70). Nor will one vice-chancellor modify or interfere with a decree made before another vice-chancellor (*Astor v. Wood*, 3 *Edw. Ch.*, 371). So in England, a cause heard before the chancellor may be re-heard before the chancellor or his successor in office. If it has been before any of the other judges, it may be re-heard before the judge who heard it previously, or before the lord chancellor, in which case it is generally termed an appeal, although in fact it is only a re-hearing. When the statute (5 *Vic.*, c. 5) created two additional vice-chancellors, it was made one of the provisions of the act, that one vice-chancellor could not re-hear any matter in which an order or decree had been made by another vice-chancellor (3 *Dan. Ch. Pl. & Pr.*, 16, 17, 18). Although we have no statute which expressly prohibits one judge from re-hearing a matter decided by another judge, the rule is so well established, and so important for the protection of parties from unjust vexation, that if it has not already been it is full time it should be incorporated into the equity law of this State. (3.) But there is another ground upon which it cannot be permitted, and that is, the doctrine of *res adjudicata*. We have tribunals to whom parties may appeal from an erroneous decision made by a judge at special term, and if parties conceive themselves aggrieved by the decree of one judge, they must take their remedy by appeal, instead of applying to another judge to re-hear their complaints.

VI. I will now examine into the validity of the orders made by Justice J. F. BARNARD upon the re-hearing, by which Has-kin was substituted trustee in the place of Birdsall, as well as the subsequent orders made to carry that order into effect. If, as I have already attempted to show, the order of Justice

Livingston's Petition.

LEONARD was right, it follows that the subsequent order of Justice BARNARD cannot be sustained ; for it was made upon substantially the same state of facts. But it is unnecessary to rest the case here : for *pending these proceedings before Justice J. F. BARNARD upon the re-hearing, the parties entered into a valid and binding agreement by which the controversy was settled* :— a settlement which was clearly just, and advantageous to all the parties. This settlement, if the trust is valid, ought to receive the sanction of a court of equity, and should be enforced against all the parties. It was suggested on the argument that the settlement was not binding upon the petitioners, because they are infants : but a court of equity will enforce it if it is made for their benefit, as this clearly was (*Rogers v. Cruger*, 7 *Johns.*, 557 ; *Scovill's Case*, *Mosely*, 224).

It was, therefore, right and proper that the proceedings should be discontinued as they were, by an order of the supreme court at special term, upon the stipulation of all the parties. This order was made before Mr. Justice LEONARD, upon the basis of the settlement, and it, in terms, vacated all the orders which had been theretofore entered in the proceedings. Notwithstanding the settlement and a formal discontinuance of the proceedings, Justice JOSEPH F. BARNARD, subsequent thereto, and on the 12th of April, 1865, made an order on the re-hearing, removing Birdsall as trustee, and appointing *John B. Haskin* in his place.

On application of Mr. Haskin, he afterwards made another order, at Poughkeepsie, directing his order of the 12th of April, 1865, to be entered as of the 31st of August, 1864. It is not to be disguised that the object of this last order was to overreach the settlement. It was founded upon the affidavits of Mr. Haskin, and the clerk of the court. Mr. Haskin swore that he had the original memorandum order of Justice BARNARD as follows : "The — day of —, 1864," and that the erasure of figure four in the year, and the insertion of April 12, 1865, was an error of the clerk, and such order should be corrected and entered as of August or September, 1864. The clerk swore that about a week or two after the rehearing in August, the papers came to him from Justice BARNARD by express ; and that, subsequently, he received the decisions written on some of the affidavits, and on the motion, which was found in the judge's private room. He

Livingston's Petition.

also swore that the papers were received, and said order made as early as August, 1864. That all this was substantially false, in every important particular, plainly appears by the affidavits of the clerk and others, subsequently made, and used upon the motion of Birdsall to set aside the order. The clerk then swore that the order of the 12th of April, 1865, *was on that day given to him by Justice GEO. G. BARNARD*; on which day he filed all of the papers in this matter, together with said order, and marked the whole of them: and that he received the *memorandum of the decision before referred to, subsequent thereto, and several days thereafter*: that he did not find it in the judge's private room, *but the same was handed to him in the latter part of April*. He further says, that his former affidavit was made under a misapprehension. But this is not all. Birdsall states in his affidavit, and in this he is corroborated by Herman Fox, that on the 18th of April, 1865, he examined the papers on file, and *the memorandum in question was not then on the paper*, on which it was subsequently found to be endorsed. These facts were not contradicted before Justice SUTHERLAND, on the part of Haskin or Livingston. I think, therefore, it is quite apparent that the order of Justice JOSEPH F. BARNARD, ante-dating his order of removal to August 31, 1864, was made under an entire misapprehension of the facts. But whether the order was fraudulently obtained or not, the fact is put beyond doubt by the affidavit of the clerk, *that no order was published by Justice JOSEPH F. BARNARD removing Birdsall as trustee, until the 12th of April, 1865*. It could not take effect prior to that time, by force of another order made afterwards.

There is another order which claims our attention, granted upon the motion of Mr. Haskin, by Justice SUTHERLAND, at special term, setting aside the order of Justice LEONARD, already referred to, discontinuing the proceedings. This order was made at the same time that the judge denied the motion to set aside the order of April 12, for the reason doubtless that it was regarded as an obstacle in the way of Haskin's getting possession of the trust property, under the order of April 12th. The reasons of Justice SUTHERLAND for setting aside the settlement of October 3, 1864, are not given in the case: but grounds upon which the application was made, deserve attention. Mr. Haskin

Livingston's Petition.

states in his affidavit, that Birdsall pretended that the proceedings in the matter of the petition were discontinued, but that, as he is informed by Livingston, and verily believes to be true, the said Birdsall obtained his signature to the said stipulation and agreement of the third of October, by falsely and fraudulently pretending and representing to said Livingston, that the motion argued herein for Birdsall's removal, on the twenty-third, twenty-fourth, and twenty-fifth days of August, before the Hon. J. F. BARNARD had been denied; and by other false representations and pretences. Birdsall, however, in his affidavit denies this, and states further, that on the thirtieth day of May, he called on Livingston, and showed him Haskin's affidavits, and that Livingston then told him that all of said affidavits in relation to what Haskin alleges was said to him by Livingston, as herein referred to, is false and untrue. Mr. Livingston did not make an affidavit in the matter; but it appeared by the affidavits of Mr. Courtney, as well as that of Mr. Birdsall, that the settlement was fairly made by the mutual consent of all the parties interested.

Surely the court would not set aside the settlement and stipulation for fraud, when the party who is alleged to have been defrauded does not complain of it.

There are many other things which might be noticed, tending to reflect upon the character of the proceedings under review, but the facts already referred to, are sufficient, I think, to enable the court to dispose of these appeals.

VII. It is claimed, however, that no appeal will lie in this case, or that, at least, that this court will not review the order removing Birdsall as trustee, as it rests in the discretion of the supreme court, and is not subject to review in this court. As I have already stated, an appeal is given by the *Laws of 1854*, p. 592, § 1. By section 330 of the Code, which is made applicable to such appeals, this court may reverse, affirm, or modify the order appealed from, and may order a new trial. The orders appealed from also affect a substantial right made in a special proceeding under § 1, of the Code, and for that reason are appealable as such to this court (*Hyatt v. Seeley*, 11 *N. Y.* [1 *Kern.*], 52).

No provision having been made by the Code for a finding of facts in such a case, this court is necessarily required to examine

Livingston's Petition.

the affidavits and evidence upon which the case was decided. An unrestricted appeal takes along with it the whole merits of the determination appealed from (*Bates v. Voorhees*, 20 *N. Y.*, 528).

It may be true, as was said in *Rogers v. Hosack* (18 *Wend.*, 329, 330), that the court of appeals will not interfere to regulate the discretion of a court of equity, when the statute has vested that court with power to remove a trustee for a particular cause: but I think such a principle is not applicable to this case.

Upon the application of William Winter to remove Birdsall for insolvency, the evidence in this case is such that this court would not feel authorized to interfere with the decision of the court, whatever its determination might be. But, when the court undertakes to act upon the applications of third persons claiming in remainder, who have no immediate interest in Birdsall's insolvency, the question assumes another aspect: and when one judge overrules the decisions of another judge, under pretext of a re-hearing upon substantially the same state of facts, it involves a principle which affects the administration of justice in this State, and presents a question eminently proper to come before this court for review.

And so in reference to the orders made subsequent thereto, by which a valid settlement and final discontinuance of the proceedings were avoided upon grounds which were not only false in fact but insufficient in substance.

Although no appeal was taken from the order of Justice G. G. BARNARD ordering a re-hearing of the petition, it is necessarily connected with the final order of Justice J. F. BARNARD upon such re-hearing, which in effect reversed the previous order of Justice LEONARD: and its validity is doubtless involved in the principal appeal from the final order of Justice J. F. BARNARD removing Birdsall as trustee, and appointing Haskin in his place.

I have no doubt as to our power to examine the whole case upon the merits, and to make such order in the premises as we shall deem suitable and proper in view of all the circumstances. This being a proceeding in equity, we may not only reverse, but if necessary make such final order or decree in the premises as justice may require (2 *Rev. Stat.*, 167, § 27; *Laws of 1847*, ch. 280, § 8; *Le Guen v. Gouveneur*, 1 *Johns. Cas.*, 436, 499; *Forrest v. Forrest*, 25 *N. Y.*, 501).

Livingston's Petition.

I have already said enough as to the character of these proceedings, to justify us in reversing the orders appealed from, on account of their departure from the rules and practice of the court. These rules of practice have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this as well as every other civilized community.

But if we look only at the merits of the case, it is impossible to sustain the proceedings.

No reason can be assigned for superseding the deed of settlement of October 3, 1864. If the trust deed is to stand, there could be no more proper arrangement made for securing the rights of all the parties, and the preservation of the *trust estate*. If we lay out of view the insufficiency of the evidence upon which the deed of settlement was overreached by the order of Justice SUTHERLAND, there is no ground upon which the court could properly make such an order upon the motion of Mr. Haskin. He had no interest whatever in the original controversy; and his subsequent appointment as trustee did not give him any standing in court to interfere with the prior proceedings. He was merely a volunteer; and yet we find that the court acted solely upon his motion in granting the application, which in effect overreached a settlement of the entire controversy, mutually beneficial and satisfactory to all the parties.

I would, therefore, advise that all the orders appealed from be reversed, and that the order of Justice LEONARD, made at special term, October 4, 1864, by which the proceedings were discontinued, without costs to either party, be affirmed. This will leave the parties to go on under the deed of settlement made and signed by all the parties, October 3, 1864.

Although the case furnishes strong grounds for setting aside the trust deed, that question is not properly before us. As to the costs, we may award them at our own discretion (*Laws of 1854*, 592, § 3). I think the respondents should be charged with the costs of all the proceedings taken by them, after the settlement of October 3, 1864, together with the costs of the appeals in this court.

All the judges concurred.

Pullman v. The Mayor, &c., of New York.

54 Records
Barb. 169.

PULLMAN *against* THE MAYOR, &c., OF NEW YORK.

Supreme Court, First District ; Special Term, November, 1866.

MUNICIPAL CORPORATION.—ACT OF 1866, AS TO CONTRACTS BY
THE CITY OF NEW YORK.—INJUNCTIONS AGAINST OFFICERS.

Under the provisions of the act of 1866, the corporation of the city of New York are not authorized to make a contract for lighting the city with gas, for a period beyond one year, or an amount larger than the sum appropriated by the act.

An injunction may be issued to restrain a municipal corporation from entering into a contract which is beyond their legal powers.

Motion for an injunction.

This action was brought in July, 1866, by Christopher Pullman, a member of the Common Council of the city of New York, against the Mayor and the Common Council of said city, and Charles G. Cornell, Street Commissioner, to restrain the defendants from proceeding under a resolution of the common council of the city of New York, passed on or about July 10, 1866, in the words following :

“*Resolved*, That the Street Commissioner be and he is hereby authorized and directed to make a contract for lighting all the streets, avenues, roads, squares, parks, public buildings, and places of the city of New York, with coal gas, such contract to be founded on sealed bids or proposals, and to be made with the company giving adequate security, to be approved by the comptroller in the manner provided by law, which shall agree to do the same for the lowest price for each lamp or light per annum, or quantity, when it can be measured according to existing regulations, and affording to such company sufficient time to lay their mains and introduce gas as required by the contract. The provisions of the contract last made and executed with the Manhattan Gas Company, as far as practicable, shall be em-

Pullman v. The Mayor, &c., of New York.

bodied in the contract made in pursuance of this resolution, and the term during which the same is to continue shall be for the same number of years as that contract. Any resolution or ordinance inconsistent with this resolution is hereby repealed."

The injunction was sought on the ground that the term for which such contract would be made would be twenty years (that being the term of the Manhattan Gas Co. contract): that by the act, *Laws of 1866, ch. 876*, the legislature appropriated the sum of \$763,745 to pay for lighting the public lamps of New York city for the year 1866; that no other sum was ever appropriated for such lighting for a greater period: that by the 9th and 10th sections of the same act, the common council were prohibited from making a contract for such lighting, for a longer period than one year; that such passing of said resolution, was a violation of law and of their duties by said common council, and the making of such contract so directed to be made, would be illegal, and any such contract so made would be void: that the making of a contract for twenty years at a price to be fixed now, would deprive the city of any benefit flowing from competition in the gas business and from a fall of price; that it was designed to make such contract for the price of fifty dollars or more for each public lamp, which would amount to about \$1,200,000 per year, which is wasteful and extravagant: that the corporation of New York is a *limited* corporation, restricted by several charters and acts of the legislature, among them the act aforesaid: that the common council of said city is, and the members thereof are *trustees* of the property of such corporation, and that the plaintiff is a member of said common council, and is a *co-trustee* with the other members of said common council, and he and they are "bound in law and equity, to protect and preserve the said property to the people of the said city, who are the beneficiaries of said trust:" that plaintiff protested and voted against said resolution, before it was adopted by the common council, for the above reasons. That the said contract was not yet made, but the street commissioner was about to advertise for proposals; that the payments under such contract would be made from the taxes levied, and other of such trust property: and plaintiff prayed the equitable intervention of the court for the protection of the trust property from the contemplated waste by the trustees, the common council. A

Pullman v. The Mayor, &c., of New York.

preliminary injunction was granted by Mr. Justice GEORGE G. BARNARD, on an affidavit reciting substantially the above matters, and served on a majority of the members of the common council, on the mayor, and on the street commissioner. The motion for a perpetual injunction, made by plaintiff, was submitted upon written points to Justice GEORGE G. BARNARD, on August 31, 1866, and the defendants put in an affidavit of Wm. M. Tweed, deputy and acting street commissioner, stating that there are no contracts existing for the lighting of the city with gas, and said corporation is liable for such charges as the gas companies see fit to impose; and they have to pay a much larger sum, than if a contract were made therefor.

Charles Tracy, and Joseph F. Daly, for plaintiff.—I. The common council of the city of New York and the members thereof are trustees of the property, funds, and effects of said city, so far as the same are, or may be, committed to their care or control (*Laws* 1864, ch. 406, § 3). 1. This act passed by the legislature of 1864, was simply declaratory of the then existing law. At common law the officers of a municipality were always trustees, and their office was always a public trust. 2. The common law rights and liabilities of trustees belong to, and are inseparable from every act of the common council and the members thereof, when acting in their official capacity. 3. The right of a co-trustee to seek the equitable interference of the courts to prevent a waste of the trust property contemplated by the other trustees, is well established. 4. The plaintiff Pullman, as he alleges in his affidavit, understood and appreciated his duties as such trustee, and protested against the contemplated gas contract in the councils of the trustees before it was finally resolved on by the majority. 5. So far from there being any question as to the right of Mr. Pullman to bring this suit, it is his *duty* to seek the aid and instruction of the courts upon the point. 6. The time is come to carry out the principles which govern trusts, in the administrations of the vast municipal trust, in which the city property is held.

II. The powers of the common council (trustees) are expressly limited. The first and greatest limit is in the matter of raising money, for they are absolutely powerless to levy taxes, the right being reserved to the State. If it be contended that they can

Pullman v. The Mayor, &c., of New York.

make any contract they please, how can such a proposition be made to agree with the fact that the money to pay liabilities created by contract, may be granted or withheld at pleasure by the State? 1. The act of 1866 expressly declares that no contract shall be made for any purpose not contemplated by the act, nor which should render the city liable for an amount greater than the sum devoted by said act for such purposes. The sum devoted for gas by such act, is seven hundred and sixty-three thousand seven hundred and forty-five dollars. The liability fastened on the city by the contemplated gas contract for twenty years, would be over twenty-five millions of dollars. 3. The powers of the corporation are limited expressly every year, by each successive tax levy, which is but a new annual charter, enlarging or restricting such powers.

III. A contract for twenty years for gas would be most injudicious and wasteful. Coal from which gas is made, is, and has been, unprecedently high for many reasons, particularly the scarcity of freighting accommodation, caused by the absorption of vessels during the war, for government purposes. When things become settled, and the freights are reduced by reason of the return of such vessels, coal will fall. New charters for gas companies are granted every year, and a lively competition, resulting inevitably in a fall of price, must be expected. Under this twenty year contract, the city can reap no advantage from either of these contingencies. 1. The rules governing the administration of trust property, are in no wise unlike those governing the proper administration of any man's private affairs, so far as economy is concerned. What is prudent in one case, is prudent in both. And trustees are required to use the same prudence and forethought as they would use about their individual affairs.

IV. The plaintiff makes a *prima facie* case for the relief sought by the action: and if the preliminary injunction were now dissolved, the defendants would be at liberty to make such a contract as would wholly defeat the power of the court to render judgment for such relief. In such a case, no mere denial of the equity on a motion to dissolve the injunction is enough: and although the proofs at this motion might be such as to cause the court to doubt the plaintiff's right to recover, yet according to the established practice the injunction should be .

retained till the trial of the cause, in order that equity be not defeated. *Voorhies' Code of 1864*, p. 411; *Minor v. Terry*, 6 *How. Pr.*, 211; *Crocker v. Baker*, 3 *Abb. Pr.*, 182.

Richard O'Gorman, for defendants.—This action is brought by plaintiff as a member of the common council and co-trustee with the defendants in order to obtain a judgment declaring a resolution of the common council (set forth in the complaint) to be illegal and void, and restraining the defendants from making the contracts, and advertising the proposals, specified in the resolution, &c.

The plaintiff avers that the resolution which he seeks to avoid, is in *form a valid ordinance*. His reasons for asking the court to declare it void are :

First. That it is in law void and invalid, and that its invalidity might involve the corporation in expensive legislation.

Second. That according to the information and belief of plaintiff, the contract therein referred to would be injudicious, wasteful and most extravagant, and that if said contract were made it would be made at an extravagant price for twenty years, and would absorb a vast annual sum of money, and enrich monopolists.

To deal with the second class of reasons. First. It will be seen that there is no allegation of fraud, improper motive, undue influence. There is no fact alleged. The plaintiff sets forth the grounds of his opinion, and defends his vote as one of the minority who opposed the passage of the resolution. But beyond that opinion, which is no doubt satisfactory to himself, the plaintiff affords to the court no light to enable it to judge why he supposes the contract would be injudicious, or wasteful, or most extravagant, or tending to enrich monopolists. He gives no ground whatever for his opinion that the contract would be made at the rate of fifty dollars or more per year for each lamp, or that such a price is exorbitant, or that the price of gas is now at its height. All these things may be so, but the moving papers set forth no fact from which the court can be legitimately led to such a conclusion. As to the fact that by the resolution the operation of the contract to be executed was to continue for twenty years, no suspicion of delin

quency on the part of the majority voting for the resolution can be deduced therefrom.

The terms of the former contracts were twenty or fifty years. That a term should be agreed on sufficiently long to warrant capitalists in investing the amount necessary for the construction of mains, pipes, &c., is clear, and the mayor in his veto message recognizes the fact. Whether the term should be twenty or only ten years, is a question which was properly before the common council, who were the proper authorities to decide the question. They are the legislative organ of the city. The mayor is the executive organ. Surely it is not a question for this court, whether the majority of the common council were right or wrong in the decision they arrived at on that point. In the absence of all allegation or suspicion of fraud, it must be assumed that the common council acted deliberately or for good cause, and without some reason it cannot be assumed that the minority who voted against the resolution were right, and the majority who voted for it were wrong.

That such a contract as the resolution directs should be made, is manifest. It is absurd that this city should continue to depend for its light by night on the good will of certain gas companies, who are not bound to light a single lamp, and may if they please leave this city in darkness when they will.

This resolution then, is, for all that appears on the moving papers, not-only, as is admitted, valid in form, but is clearly necessary and proper, in all respects but in this, that it may indicate for the contract a term unnecessarily long: but this is a matter of opinion, in which the common council may be in the right.

The question of fraud does not arise. On what ground then is the aid of this court of equity invoked? Merely this, that the resolution is by reason of certain legislation of the last session, invalid, void, and conveying no right. It does not seem necessary to call on a court to adjudge that to be void which is void; and to meet this apparent absurdity, the plaintiff avers that the resolution, although void, may yet lead to litigation if acted on. The course adopted by the plaintiff to prevent litigation is peculiar. In order to prevent a *possible* litigation in the future, he himself inaugurates a certain litigation in the present. This complaint is in the shape of a bill *quid timet*,

and never was a more delicate prescience of remote possibility made the basis of an action. How can the plaintiff know, or surmise, or suspect, that any gas company in this city will be less skilled in the effect of this law of 1866 than himself. If the resolution is void, a contract made in obedience to it is void too. Are not gas companies bound to know this, and likely to know it, as well as he? And if they are ignorant on the subject, and stumble into a contract in which there is no legal validity, is it not likely that they may find it out when they come to demand payment from the city for the gas furnished in accordance with it? There is no cause of action in this case, even if the plaintiff's view of the law is correct. If the resolution is void in law, no rights can be conveyed by virtue of it, and it will be time enough to seek the aid of the courts for the protection of the city when it is wrongfully assailed.

The plaintiff has no right to the judgment he asks. If all that he alleges or insinuates, or suspects, be true, yet he has no standing in court, and no right to ask the interposition of a court of equity. But the plaintiff's position as to the effect of the law of 1866 is incorrect. His views of that law amount to this: that inasmuch as the city tax bill provides seven hundred sixty-three thousand seven hundred and forty-five dollars, for lighting the lamps of the city for the year 1866, the corporation can make no contract for the lighting the city for 1867, or any subsequent year, because such contract would involve the expenditure of a greater sum of money. This proposition, if correct, would reduce the corporation to a condition of utter helplessness. The city cannot live thus, from hand to mouth. There are many transactions necessary for its existence, which cannot be accomplished unless by contracts extending over years, and involving the expenditure of larger sums of money than the appropriation for any one year.

If the corporation could not incur a responsibility continuing beyond one year, no contractor would run the risk of dealing with them. But the proposition is absurd. The tax bill of 1866 provides for the expenditure of that year. The "objects and purposes" for which the sums therein mentioned were appropriated, were the obtaining supplies for that year. During that year no more than seven hundred sixty-three thousand seven hundred and forty-five dollars can be spent on

Pullman v. The Mayor, &c., of New York.

gas ; but surely no reference was meant to 1867, or any subsequent year. As far as these years are concerned, the corporation will state to the legislature the amount they need, as they have heretofore done, and the legislature will direct the imposition of a tax, as they have heretofore done, to meet the demand.

To claim that by this section of the tax levy of 1866, the contracting power of this corporation is taken away, is a bold proposition.

The contracting power of the corporation is as large as it possessed under the Dongan and Montgomery charters, subject to the restrictions, as to the mode of its exercise, set forth in the city charter of 1857.

It is not to be supposed that the legislature ever intended to deprive the corporation of its power, thus clearly and solemnly guaranteed to it, by an act less clear and solemn.

It is incredible that it intended to effect this purpose of permanent destruction of an ancient franchise, by a clause slipped into an act professing merely to empower the raising money, to meet the exigencies of one year.

The ordinary rules of construction meet such a case: "general words of a statute are to be restrained in their application to the subject matter in reference to which they are employed (*People v. Flagg*, 17 *N. Y.*, 587; *Farmers' Loan Company v. Mayor*, 4 *Bosw.*, 89; *Breasted v. Farmers' Loan Company*, 8 *N. Y.* [4 *Seld.*], 299).

The cause of such a rule is manifest. It is possible that the legislature, in dealing with some special subject, and being attentive only to that, may in haste, or carelessness, or inadvertence, use language which may admit of a more general application, and thus lead to consequences they never intended. If, on the other hand, they mean to express their will on some general subject, they can easily do so clearly and plainly, so that no doubt can exist. In the construction of statutes, the object is to ascertain the intent of the legislature, and although the latter may lead to certain consequences, if the intent seems the other way, the strict letter of the law is made to yield to the intent (*James v. Patton*, 6 *N. Y.* [2 *Seld.*], 9). The position of this case then is this :

I. The plaintiff makes no allegation of any fraud or intent

to commit fraud, on the part of any of the defendants, or any one else. The fear he expresses that some damage may occur to the city from the course he deprecates is a groundless fear, depending only on the opinion of the plaintiff, and having not a single fact alleged to support it. For all that he states, the act he desires to prevent is an act highly advisable, and necessary to the city, and his interference a positive injury to the city.

II. If, as plaintiff claims, the resolution be void, illegal, invalid, no valid contract can be made thereunder—no legal rights can accrue—no damage can arise; no litigation need be feared—and if it comes, it cannot be more difficult or expensive than that which plaintiff now forces on the city.

III. The act which the court is called on to prevent is a legal act—a proper legitimate exercise of the contracting power of this city, secured to it by ancient charters, necessary for its existence and utility. The judgment claimed in the complaint would be a grievous wrong. The temporary injunction obtained does injury to the city, and offends its dignity.

It may be well to deny to no man the opportunity of proving against public officials any charge of delinquency, and to stay for a time any official act, about which any suspicion of wrong may lurk; but the interposition of a court of equity should never be asked, unless on facts clearly and distinctly sworn to, from which the conscience of the court may be satisfied that good grounds exist for the application. In this case no such facts have been alleged. The position assumed by the plaintiff as co-trustee with the defendants does not strengthen his case. Against the other trustees, whose motives he does not seek to impugn, he stands one of a small minority. Against them he alleges neither fraud nor incompetency, and merely claims that his opinion as to the fitness of the act he impeaches differs from theirs.

IV. In no capacity has the plaintiff shown any right to the injunction. 1. The step which it prevents is legal. 2. If not legal, no injury can happen from it, which cannot be prevented by the ordinary course of law. By granting the injunction serious damage may be inflicted on the city. By withholding it no damage may be inflicted, because if the resolution is void,

Pullman v. The Mayor, &c., of New York.

the contract founded on it is void, and a suit on the part of the gas company who has acted under such contract must fail.

Charles Tracy, and *Joseph F. Daly*, in reply.—The argument for the defendants is an attempt to nullify the laws by which the people of this city are protected against the wastefulness of the common council. It claims that that body has perfect contracting power, notwithstanding the limit placed by law on its expenditures; and, therefore, that when this common council is limited to a certain amount for gas for 1866, it may incur a debt of double that sum for any subsequent year. There would have been no clearer fallacy if the argument had claimed that this common council could legally incur a debt for this year's gas beyond the sum it is authorized to pay for that purpose.

The convenience, or inconvenience, of being under limit of expenditure for gas, and not being free to make a long time contract, was a subject for the legislature; and that body determined that the public convenience and economy would best be served by giving the common council a fixed sum to spend on gas, and depriving them of all power beyond that sum. This legislation must be obeyed; and it both means and says, that this common council can go into gas contracting to the sum limited and no farther, whether the gas is for this year or any other and longer period. There is not placed at disposal, an annual sum for a series of years, but a single gross sum of money for gas this year. Another statute may take care of future years: this confines the corporation to a single year.

At present the city has gas without a long contract. The statute assumes that it can have gas in the same way through the current year. If the gas producers will not supply it, this year, the inconvenience will be one which must be borne, and the common council have no veto power to annul the statute. But no such necessity exists. The city can get its gas this year according to the statutory plan. No company will fail to supply on the terms of the act. The legislature were capable of seeing this fact, and did see it; and there is no kind of necessity for a usurpation of power by the common council, nor would any emergency justify such an usurpation.

The argument dwells on the alleged absence of charge of fraud.

Pullman v. The Mayor, &c., of New York.

There would be something specious in that point, if the whole complaint was not, as it is, a continuous exhibition of a gigantic fraud, which is corruptly attempted. The word *fraud* does not make a case; nor does the lack of it hurt a case. The transaction, as detailed, and not controverted, is one grand fraud. Every feature of a fraud is present; namely, the causing of great loss and prejudice to the city, and the perpetration of the act under color and pretence of authority, but in breach of the spirit, intent, and letter of the law. If such a transaction as this could slip through the court, there would be nothing to hinder this common council from making a gas contract for a century, and binding the estates and earnings of several generations to its fulfilment.

The other point of the defendants' argument, namely, that if the contract would be illegal and void there would be no harm in having it made, is novel. Here are trustees about to make a wasteful and ruinous contract binding the trust fund, and when the beneficiary claims to interpose the objection of illegality, they answer—well, if it is a void contract, you can set it aside afterwards. Here are public agents, about making a contract in the name of their principal, which is in excess of their powers, and the principal is not to be heard when asking for preventive justice because he can set aside the contract after it is made. The courts of equity never listen to such answers. Trustees and public agents are not allowed to go beyond their fixed powers, and are not allowed to impose colorable burdens on the fund. These representative persons are never allowed to go beyond their charter. Equity does not stop to inquire how badly the fund may be hurt, nor how easily the hurt may be cured, but it interposes promptly, and prevents the wrongful act. Equity does not recognize any pretensions of agents in favor of a breach of duty as harmless; but hinders every such breach without stopping to weigh or measure the precise amount of mischief which may follow from the lawlessness of the agents.

The argument of the defendants furnishes a conclusive reason why we should have an injunction, by showing that a color of legality would tinge the wrongful contract, and it could not be set aside without litigation and effort. That a trustee should be allowed to involve the fund in an alternative of submitting to a wasteful and illegal contract, or of seeking redress and pro-

Pullman v. The Mayor, &c., of New York.

tection by defences to suits for payment, and by actions to avoid a formal contract, is not to be endured. The common council exists for the benefit of the city, not the city for the benefit of the common council. These public servants are to be kept to their place. They are not unlimited in authority. They are to be restrained by the courts, whenever they attempt to transgress. The statute has opened the door of the courts to citizens, and to courageous members of the common council, in order that just such wrongs as the present, should be dealt with, not only by redress after the wrong is perpetrated, but also by that *preventive justice*, which is peculiar to equity courts, as the guardians and conservators of all trusts, public and private.

The wastefulness and extravagance of contracting, in the present state of prices, for a twenty years' supply of gas, is so obvious that no argument to demonstrate it can be required. The chances that the city may require gas at all, for a whole twenty years, depend on the progress of the arts. A period half as long, has given the world coal oil, and petroleum, and ocean telegraphs; and another ten years may give new methods of lighting the streets so much better than the gas posts, as to displace them altogether, and leave the contract a useless burden on the treasury. The last half year has brought to light, immense beds of bituminous coal on the shores of the lower bay, within twenty-five miles of the city; which beds, when put in working order, should perceptibly reduce the cost of gas. The common council cannot be blind to these considerations; and their deliberate attempt to subject the city to a grievous burden, in the face of the Mayor's veto message, is dishonest, and has its motive in corruption. The protection of the tax payers cannot be had, by trying to reason with such men, but only by invoking the power of the court by injunction, to prevent the consummation of the wrong.

GEORGE G. BARNARD, J.—The act of 1866 (2 *Laws of 1866*, p. 2056) authorizes the supervisors of the county of New York to raise by taxation certain sums, for certain specified objects, and among others the sum of seven hundred sixty-three thousand, seven hundred and forty-five dollars, for lamps and gas. It then provides as follows:—"The said several sums shall be applied only to the objects, and purposes, for which the

same are hereby appropriated, and neither said corporation, nor any member or officer thereof, nor any department or head of department, or other official, shall incur any liability for any of the objects and purposes specified to an amount beyond the sums so appropriated :” and again :—“The mayor, alderman, and commonalty of the city of New York, shall not be liable upon any contract made, or expenditure authorized, or liability incurred by any board, department, or officer, of said corporation, for any object or purpose which is not expressly authorized by this act, nor for any contract made, or expenditure authorized, or liability incurred by any board, department, or officer of said corporation, for any object or purpose named in this act, beyond the amount appropriated to such specific object or purpose.”

I do not understand it to be claimed that these provisions of the act are unconstitutional. There are then but two questions, viz. :

1. Does a proper construction of the act prohibit defendants from making the contract in question.

2. If it does, are the consequences of making such contract sufficient to call for a preventive remedy.

That the first question requires an affirmative answer, seems to me almost too clear to admit of argument. If the appropriation is made for the sole *object* and *purpose* of procuring the lighting of streets for *one year* only, then as the proposed contract in question extends beyond one year, and contemplates binding the corporation to take gas for more than one year, and imposing on it a liability to pay for the use of such gas for those other years, it is prohibited under the clause declaring that the corporation “shall not be liable upon any contract made, or expenditure authorized, or liability incurred * * * * *for any object or purpose not expressly authorized by this act.*”

If the appropriation is to be regarded as not limited to procuring gas for one year only, but is intended to authorize the procuring of so much gas as can be procured for that amount, without any limit as to the term within which it shall be supplied, then, as this proposed contract contemplates rendering the corporation liable for a much larger sum than that appropriated, it is prohibited under the clause declaring that the corporation “shall not be liable for any contract made, or ex-

Pullman v. The Mayor, &c., of New York.

penditure authorized, or liability incurred * * * * *for any object or purpose named in this act, beyond the amount appropriated to such specific object or purpose."*

It may be that the attention of the legislature was not called to the consideration of the question, whether it might not be necessary to make a contract for the supply of gas extending over a term of years, and that if their attention had been called to the consideration of such question, provision would have been made to meet the case. But if no provision was made to meet the case because attention was not called to the subject, it becomes simply a *casus omissus*, which the court is not authorized to supply. On the other hand, it may be that the attention of the legislature was called to the subject, and that they determined there was no necessity for a contract for longer than a year.

Whatever consequences ensue from this want of power to make a contract for a term of years, must be ascribed to the legislature: the possibility of such consequences does not authorize either the common council to transcend their powers, or this court to sanction them in so doing.

With reference to the second question, viz. :—are the consequences to flow from the making of this unlawful contract sufficient to call for a preventive remedy,—it is urged that if the contracts when executed will be void, no damage can arise from their execution, and consequently an injunction should not issue. This contract, if made, confers rights of property, and is to last for twenty years, and the fact of its having been granted might present embarrassment in the way of its being subsequently set aside. In the *People v. Mayor* (32 *Barb.*, 102) it was held that under such circumstances the preventive remedy by way of injunction was not only lawful, but was the best and safest remedy which could be adopted.

Here the parties defendants are trustees; their co-trustee seeks to enjoin them against committing a breach of their trust and they come in and say, although the court shall decide that the act which we are about to do would be a breach of our trust, yet the court should permit us to go on and do it. Under such circumstances even the possibility of inconvenience arising from such breach will be sufficient to call on the court to prevent its commission. I have not considered the question

Leeds v. Bowen.

whether it is more expedient to have gas furnished from year to year, than upon a contract for a term of years, nor whether the terms of the proposed contract are for the best interests of the city; as in the view which I have taken of this case these matters are not material to its decision.

The injunction must be continued.

LEEDS *against* BOWEN

New York Superior Court; General Term, May 1863.

AUCTIONS AND AUCTIONEERS.—COMMISSIONS.—INTERRUPTED SALE.

Under the statute "of sales by auctioneers," (1 Rev. Stat., 528), an auctioneer is entitled to no compensation for his services, in the matter of a sale which he is employed to make, except two and one half per cent. on the amount of the sale made by him, unless a written agreement for more be previously made.

The services mentioned in the statute, for which two and one half per cent. is a compensation, are not merely the actual offering the goods for sale, and striking them off, but include also the duties incidental thereto, customary and necessary to secure a successful sale.

An auctioneer who is employed to sell a stock of goods upon an oral agreement for a compensation greater than two and one half per cent., and who is stopped, after selling a part, by the employer countermanding the sale, is not entitled to recover commissions at the rate agreed, on the value of the whole stock of goods.

Exceptions taken on the trial and directed to be heard in the first instance at general term.

The action was brought by Henry B. Leeds, and Allen B. Miner, on a contract by which the defendant, Sidney W. Bowen, had employed them as auctioneers to sell a stock of goods.

The cause was tried on the seventh day of March, 1862, before Mr. Justice WHITE, and a jury. The facts are stated in the

Leeds v. Bowen.

opinion of the court. It may be added, that the plaintiff Miner testified that "About the first of November, Mr. Bowen called upon us and engaged us to make a sale of his property. * * * He wished us to take charge of the sale, and do everything in our power to make it a successful sale, stating that he would advertise it specially himself, and would either have his catalogue printed, or that it was in process of printing. He wished us to perform all the necessary duties with that exception, and asked me what we would do it for the lowest, and I told him we would provide the proper clerks, distribute his catalogues, and take all the necessary and incidental action to make it a successful sale for five per cent., if that should be the amount of the sale." Another witness testified that Mr. Miner told the defendant that if the sale amounted to ten thousand dollars, he would distribute the catalogues he intended to have made out for paper and paper hangings, and would put in his general advertisement, and furnish the clerks, and perform all the duties of the sale for five per cent.

The testimony on the part of the defendant, did not conflict with this, except in contradicting that he agreed to sell the whole stock, or any particular amount.

The counsel for the defendant requested the judge to charge the jury that unless there was an agreement in writing, made between the parties, the plaintiffs were not entitled to recover a greater amount than two and a half per cent., upon the amount of the sales actually made by them.

The judge refused so to charge; to which refusal the counsel for the defendant excepted.

The judge charged the jury that an agreement in writing was not necessary for such a service as the plaintiffs undertook to perform for the defendant. They might make the agreement verbally; when the service, as proved to be here, was more than the special services which the statute contemplates, an agreement made verbally was binding upon the parties; and he therefore directed the jury to render a verdict for the plaintiffs for five hundred dollars; to which charge the counsel for the defendant excepted.

The jury found a verdict accordingly, and the judge further ordered that the exceptions taken herein be heard in the first instance at the general term.

Leeds v. Bowen.

G. Tillotson, for defendant, appellant:—Cited *Laws of 1817*, 326, ch. 275; 1 *Rev. Stat.*, 3 ed., 648, §§ 27, 28.

E. D. Mills, for plaintiffs, respondents.—The statute (2 *Rev. Stat.*, 5th ed., p. 463, § 36,) has no application to this case. (1.) This action is not brought to recover *commissions* on *sales*, but for damages arising from a breach of contract. (2.) The statute is intended to apply to sales actually made; the construction claimed by the defendant might be the true one, if the action had been brought to recover more than two and one-half per cent., on any sales actually made. The utmost that could be claimed in this case would be, that the plaintiff should be limited in his recovery to two and one-half per cent., on ten thousand dollars. (3.) The construction given to the statute was the right one.

The statute, in limiting the compensation to two and one-half per cent., on the amount of any sales, has reference to the simple duty or act of crying off the goods. Any other service or means by which a sale is made more successful, such as the reputation of the auctioneer, the bidders whose attendance is procured by such reputation, advertising the sale, distributing catalogues, making out the bills, collecting them, and paying over the money, taking the risk of bad money and bad debts,—all these are the proper subject of a contract for greater compensation. This was the agreement in this case.

BY THE COURT.*—BARBOUR, J.—By the pleadings and evidence in this case, it appears that the defendant employed the plaintiffs, who were auctioneers in the city of New York, to sell his stock of paper hangings at auction, upon a representation that such stock was inventoried at some eighteen or twenty thousand dollars, and would sell at auction for ten thousand dollars, for which the plaintiffs were, by the agreement, which was entirely oral and not in writing, to receive five per cent upon the sales, for their compensation; that the auction sale contemplated by the agreement was actually commenced, and, after about ninety dollars' worth of goods were sold, such sale was stopped by the defendant, for the alleged reason that he had disposed of the remainder of his stock at private sale. The

* Present BARBOUR and MONELL, JJ.

court held that the plaintiffs were entitled to recover five per cent. upon the whole ten thousand dollars, and directed a verdict accordingly; to which the defendant excepted.

The thirty-sixth section of the statute "of sales by auctioneers" (2 *Rev. Stat.*, 5th ed., 463), declares that "no auctioneer shall demand or receive a higher compensation for his services, than a commission of two and one half per cent. on the amount of any sales, public or private, made by him, unless by virtue of a previous agreement in writing, between him and the owner or consignee;" and the thirty-seventh section imposes a penalty of two hundred and fifty dollars, for a violation of the provisions of section 36.

The services mentioned in the act, are not, merely, the offering of the goods for sale, and striking them off. Indeed, the auctioneer need not sell at auction at all; but may dispose of them at private sale. (§ 36). In addition to selling the goods, it is also, under the statute, the duty of the auctioneer, as such, to advertise the proposed sale in a newspaper (§ 34), and, in case the purchase money shall not be paid immediately, he must enter the sale, with all necessary details, in a book to be kept by him for that purpose (§ 39); and he is also required to have a store or auction house for his business (§ 30).

But, aside from the statute, an auctioneer, like any factor, is bound by his undertaking to sell goods, to take all such proper and incidental steps, to insure a successful sale, as is customary and necessary. If, in performing those incidental duties, any expenses are incurred, such expenses will be properly chargeable against the owner; but the auctioneer is entitled to no compensation *for his services* in the matter of the sale or its incidents, except the two and a half per cent. fixed by the statute, unless a written agreement for more shall previously have been made. Any agreement providing for a commission exceeding two and a half per cent., unless the same shall be in writing, whether under pretence of covering moneys expended by the auctioneer, or his services, is, therefore, either an evasion of, or contrary to the statute, and is void.

In this case, the action is brought upon the agreement to sell the merchandise at auction, and nothing else. It is not pretended in the complaint that any services were to be, or were performed for the defendant by the plaintiffs, beyond selling a

Barnard v Heydrick.

portion of the goods; nor does the evidence show that any other services were rendered.

For these reasons, I think the direction of the justice was erroneous; and that the verdict should be set aside, and a new trial granted, with costs.

MONELL, J., concurred.

BARNARD *against* HEYDRICK.

Supreme Court, Second District; Special Term, 1866.

SUMMONS.—PRINTED SUBSCRIPTION.—SERVICE BY PUBLICATION
AND MAILING.—AFFIDAVITS.—ORDERS.—GUARDIAN
AD LITEM.

A summons, issued by an attorney with his name printed at the end thereof, is "subscribed" by him, within the meaning of the provision of the Code of Procedure, which requires the summons to be subscribed by the plaintiff or his attorney.

A statute requiring an instrument to be in writing and subscribed, is generally satisfied by a printed instrument, adopted by the parties to be bound thereby.

An order for publication of summons is not avoided by the fact that an affidavit relied on as showing a material fact on which the order was granted, was made and entitled in another action. It is allowable on such applications to read affidavits that have been used in a different suit.*

In an action for the foreclosure of a mortgage, it is sufficient, to entitle the plaintiff for an order allowing service of the summons to be made by pub-

* Although there are some cases to the contrary (*McCoy v. Hyde*, 8 *Cow.*, 68; *Clickman v. Clickman*, 1 *N. Y.* [1 *Comst.*], 611; *Cutler v. Biggs*, 2 *Hill*, 409; but see *Prescott v. Roberts*, 6 *Cow.*, 45), the practice sanctioned in the principal case seems, within due limits, to be both reasonable, convenient, and conducive to justice; and it is sustained by *Colver v. Van Valen*, 6 *How. Pr.*, 102. It is well settled that one affidavit may be entitled, and used, in several causes (*Jackson v. Keller*, 18 *Johns.*, 310; *Boyce v. Thompson*, 20 *Johns.*, 274; *Schermerhorn v. Noble*, 1 *Den.*, 682).

Barnard v. Heydrick.

lication, to show that the defendant on whom such service is sought to be made cannot, after due diligence, be found in this State. Non-residence need not be proved.

It is not necessary that an order for publication of summons should state that the affidavits referred to, on which the order was granted, afforded satisfactory evidence of the requisite facts. This may be presumed from the making of the order.*

It is not essential that an order requiring service of papers by mail should be filed before the papers are mailed. The previous deposit in the mail is, at most, an irregularity, amendable at any time, by filing *nunc pro tunc*.

After an answer has been put in by a guardian *ad litem*, and judgment entered, the regularity of the service of the order for his appointment cannot be questioned.

Motion to discharge purchaser at a judicial sale.

The action was brought by Cyprian S. Barnard, Jr., against Jesse A. Heydrick and others, for the foreclosure of a mortgage; and, after the judgment and sale, the purchaser objected to various alleged irregularities in the proceedings, and now moved to be discharged from his purchase.

The facts are stated in the opinion.

Wm. H. Arnoux, for the motion.

Barnard, Rice & Burnett, opposed.

LOTT, J.—This is an application on behalf of a purchaser of mortgaged premises, sold under a judgment of foreclosure and sale, to be discharged from his purchase, on the following grounds:

“I. That the summons is not subscribed by the plaintiff or his attorney.

“II. That the affidavit on which the order of publication was granted is insufficient, and—

* Rule 56 requires that orders granted on petitions shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. This is the better practice in the case of orders founded on affidavits to be filed with the order; though it seems that an order might be regarded as valid, without even containing a recital that any evidence had been presented to the court. *People ex rel. Greeley v. Court of Oyer & Terminer*, 27 *How Pr.*, 14.

“III. That no copy of the order appointing a guardian *ad litem*, of the non-resident infant defendant was served, according to the terms of the order.”

These grounds will be examined in the order they are above stated.

I. The first objection is based on the fact, appearing by the judgment roll, that the names of the plaintiff's attorneys, are printed at the end of the summons, forming part of the roll. This, it is claimed, is not a compliance with the requirements of the Code, which provides that “the summons shall be subscribed by the plaintiff or his attorney,” and shall require the defendant to “serve a copy of his answer on the person whose name is subscribed to the summons.”

It then becomes necessary to determine whether a summons, issued by an attorney, with his name printed at the end thereof, is subscribed by him within the meaning of that provision.

Two cases were referred to, on the argument of the motion, in which the question has been considered ; and I have been unable, after a careful examination to find any other, and in those, the learned justices who examined it arrived at different conclusions.

The first was the case of *The Farmers' Loan and Trust Company v. Dickson*, reported in 9 *Abb. Pr.*, 61, and also in 17 *How. Pr.*, 477, which was decided by Justice INGRAHAM, at special term in the first district. A motion was there made by a purchaser to be relieved from a sale on the ground, among others, that the name of the attorney was printed at the end of the summons, and the learned justice, after considering two other objections that were made at the proceedings, and stating that one of them could be remedied by filing an affidavit of the service of summons on one of the defendants *nunc pro tunc*, says in relation to that now under consideration: “The summons should have been signed, by the plaintiff or his attorney (§ 128), and the printed name of the attorney was a nullity. As the copy served was correct, the plaintiff might also file a copy properly signed *nunc pro tunc*.”

The other case was that of *The Mutual Life Insurance Company v. Ross*, reported in a note, at page 260 of 16 *Abb. Pr.*,

Barnard v. Heydrick.

in which the defendant moved to set aside the summons, served upon him, on the ground that the name of the plaintiff's attorney was printed at the end thereof. On the argument of that motion, the decision of Judge INGRAHAM was referred to, and commented upon, by counsel, and the report of the case closes with saying that "E. D. SMITH, J., after consideration denied the motion, with costs, upon the ground that a printed subscription is a substantial compliance with the statute, and the objection was technical, and if there was a defect, it was immaterial."

Neither of these learned justices appears to have assigned the reasons for the conclusion at which he arrived. I am, therefore, obliged to examine the question, embarrassed by their difference of opinion, without the benefit of the aid which those reasons would have afforded. In doing this, it may be useful to ascertain the scope and extent of the decision of Justice INGRAHAM. He treats the words "subscribe" and "sign" as synonymous: and when he says that the summons should have been signed by the plaintiff or his attorney, and that the printed name of the attorney was a nullity, he clearly indicates that such signature should have been in the proper handwriting of such attorney. If this was his meaning, he was, in my opinion, mistaken. Previous to the adoption of the Code, it was provided by the Revised Statutes (2 *Rev. Stat.*, 278, § 9) that all writs and process issued out of any court of record, should, before the delivery of the same to any officer to be executed, "be subscribed or endorsed with the name of the attorney, solicitor or other person" by whom the same was issued; and yet in the same title at page 286, § 70, it is declared that "if any attorney or solicitor, shall knowingly permit any person, not being his general law partner, or a clerk in his office, to sue out any process, or to prosecute or defend any action in his name, such attorney and solicitor, and every person who shall so use the name of any attorney or solicitor, shall severally forfeit to the person against whom such process shall have been sued out, or such action prosecuted or defended, the sum of fifty dollars."

This last provision is still in force, and by exempting the general law partner and the clerks of an attorney from the penalty imposed for using his name in issuing process, and

Barnard v. Heydrick.

prosecuting and defending actions, it is clearly implied that it may be so used by them by his permission and authority.

Although the Revised Statutes provide that the process "shall be subscribed or indorsed *with the name* of the attorney, solicitor, or other person" issuing the same, and the requirement of the Code is, that the summons shall be subscribed by the plaintiff or his attorney, the difference in the phraseology does not in my opinion justify the conclusion that a difference in practice was intended.

It will be observed that the use, by a clerk, of the attorney's name, appears to be authorized under the provision above referred to, in actions in which the attorney himself has no interest or connection; and it has, I believe, been the general practice of attorneys to allow a clerk in their office to sign their name to process issued by them. The authority given to the clerk by the attorney, in such a case, makes it his act, and he is responsible therefor to the court and the party proceeded against; and I have found no case where the practice has been called in question. There certainly appears no reason in principle why it should not be permitted. There are many instruments which the law requires to be subscribed or signed by the party to be bound thereby, and yet a subscription, or signature by him personally is not necessary. Thus, the statute regulating the execution of wills, after expressly providing that every will "shall be subscribed by the testator," recognizes a signing of his name by another person as a compliance with that provision, by a subsequent requirement that "every person who shall sign the testator's name to any will by his direction shall write his own name as a witness to the will;" and it was distinctly decided in *Robins v. Coryell* (27 *Barb.*, 556) after a full and careful examination of the question, that the writing of the testator's name to a will by another person, in his presence and by his direction, is a subscription by him, within the meaning of that statute; and an opinion to the same effect is expressed by Chancellor WALWORTH in *Chaffee v. Baptist Missionary Convention* (10 *Paige*, 91), and by HAND, J., in *Butler v. Benson* (1 *Barb.*, 533). So the statute of frauds, requiring certain agreements to be in writing, and to be signed or subscribed by the party to be charged therewith, is satisfied

Barnard v. Heydrick.

by the signature or subscription of the name of such party thereto by another person duly authorized to make it.

If such is the rule applicable to statutes in the case of wills and other written instruments requiring the subscription of parties, I am unable to discover any reason why a different construction should be given to that in relation to legal process. The views thus presented lead us to the conclusion that a subscription of the name of an attorney issuing a summons is not required to be made by himself personally, but that it may be made by another with his authority ; and assuming this to be correct, it seems to follow that his name may be printed, as a substitute for his written signature. A party may in the ordinary transactions of business become bound by any mark or designation he thinks proper to adopt and use for his name. It was decided in *Brown v. The Butchers' & Drovers' Bank* (6 *Hill*, 443), that Brown was liable as endorser by an endorsement of the figures "1, 2, 8," made by him in lead pencil, no name being written thereon, it also appearing that he could write. In that case the court instructed the jury that if they believed the figures were made by Brown, as a substitute for his proper name, intending thereby to bind himself as endorser, he was liable ; and this ruling was sustained on review. So it has been held by the general term in this district in the case of the *Mechanics' Bank* against Sullivan, heard in December, 1862 (but not reported, I believe), that a notice of the protest of a note, sent to an endorser by a notary with his name printed at the end of it, was sufficient.

It is a common practice for a person who is unable to write his name to make his mark ; and the making of such mark is held to be a good signing or subscription, within the requirements of the law, by a testator to a will (*Baker v. Deming*, 8 *Adolphus & Ellis*, 94 ; *Jackson v. Van Dusen*, 5 *Johns.*, 144 ; *Chaffee v. The Baptist Missionary Convention*, 10 *Paige*, 85).

In the case of *Baker v. Deming*, above cited, the court refused to permit an inquiry whether the person making his mark could write or not, adopting the rule that the requisite of *signing* by the statute of frauds was satisfied by the mark of the devisor, irrespective of his ability to write.

Under our statute it is required that a subscribing witness "shall sign his name as a witness ;" and it was claimed in the

Barnard v. Heydrick.

case of *Morris v. Kniffen* (37 *Barb.*, 336) among other things, "that a marksman cannot be and is not a subscribing witness within the meaning of the statute;" but the supreme court at general term in the third district (Justice HOGEBROOM giving the opinion), held, that where a witness makes his mark instead of writing his name, it is still a signing of his name, or subscription, within the meaning of the statute; and he refers with approbation to the decision by Surrogate BRADFORD, in the case of *Meehan v. Rourke* (2 *Bradf.*, 385), where he discusses the question, and concludes that such a mode of attestation was a sufficient compliance with the statute (See also *Jackson v. Van Dusen*, *supra*).

So it was held by the lord-chancellor in England, in *Harrison v. Harrison* (8 *Ves.*, 185), that a will was sufficiently executed where one witness only subscribed his name, and the two others attested it "by setting their marks respectively," and in that case it was shown that there had been a great many cases when it had been held to be sufficient for a "marksman" to be a witness (See also *Addy v. Grix*, 8 *Id.*, 504).

It appears also to be settled that where a person is in the habit of using documents with his name printed thereon, this will be his signature within the meaning of the statute of frauds (2 *Parson on Contracts*, 289; see also *Sanderson v. Jackson*, 2 *Bos. & P.*, 238; and *Schneider v. Norris*, 2 *M. & S.*, 286). In the last case *LE BLANC, J.*, said, "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping, as it seems to me, if required to be done by the party himself, or by his authority, would afford the same protection as signing."

There are also many cases where printing is substituted for writing, in instruments which under our statute are required to be in writing. It is the general practice for deeds or conveyances of real estate, and bills of sale of personal property to be printed, and it is very common to use printed agreements for the sale of both real and personal estate, and their validity is conceded; yet the statute declares that all conveyances of land, and all contracts for the sale of lands, or a note, or memorandum thereof, shall be *in writing*, subscribed by the party by whom the conveyance or sale is made, and also makes it necessary for a note or memorandum of every contract for

Barnard v. Heydrick.

a sale of goods, when the price thereof is fifty dollars or more, to be *in writing*, except in cases of part payment of the purchase money, or delivery of part of the goods (See 2 *Rev. Stat.*, 134, § 6, 135, § 8, 136, § 3).

Assuming, then, that such instruments, when printed, are "*in writing*" within the requirements of these provisions of the statute, is there any good reason why printing an attorney's name, may not be permitted as and for his signature to a summons or other legal process. In this connection I will refer to the fact that the Code provides for the service of a summons on a defendant by delivering a copy thereof, without the necessity of showing him the original (§ 134); and also authorizes a copy to be inserted in the judgment roll (§ 281). This appears to me a material fact in determining the question now under consideration. It is by the service of the summons that the action is commenced, and jurisdiction over the party is acquired; and if the service of a printed copy (for there is nothing to prohibit such a copy) is sufficient for that purpose, and such a copy may properly form a part of the judgment roll, there is no valid reason for requiring the paper spoken of, and denominated as *the* summons (but which may never be filed, but be forever kept in the pigeon holes of an attorney's desk), to be subscribed with the *written* name of the attorney, and for holding a printed subscription to be a nullity.

The *name* of the attorney issuing the summons is as effectually disclosed when it is printed, as if it were written; and his responsibility to the defendant and to the court, in either case, is the same. It would be necessary in any proceeding against him, to show that he was in fact the attorney issuing the process, and although there might be more difficulty in making that proof when his name was printed than there would be if it were written by himself or by another with his authority, that difficulty exists in all cases of agency, and is not sufficient, on the ground of public policy, or of any inconvenience to suitors, to require a different or a more stringent rule in case of legal process than in any other case affecting the private rights of individuals.

The different considerations above presented, lead me to the conclusion that the summons in this case was subscribed within

Barnard v. Heydrick.

the requirements of the Code, and that the first ground of objection to the proceeding is, consequently, not well taken.

II. The second objection involves the sufficiency of the affidavit on which the order of publication was granted.

It appears by the judgment roll, that the order purports to have been founded on an affidavit, entitled in this action, made by David B. Burnett, one of the plaintiff's attorneys, and on another made by Jeremiah Johnson, Jr., in a different action against the defendants in this, commenced by E. Burtis Brainard as plaintiff. The affidavit of Mr. Burnett, after setting forth the nature of the action, and showing that all of the defendants proceeded against as absentees are proper parties, states "that the said defendants are, as deponent is informed and believes, non-residents of this State, and are now absent therefrom, and cannot with due diligence be served with summons herein; that, as deponent is informed, the defendants, Jesse A. Heydrick, Elizabeth Heydrick, and — Heydrick, reside at Franklin, in the State of Pennsylvania, and that the defendants, Charles H. Heydrick, and Anne his wife, reside at Utica, in the said State of Pennsylvania." This was verified on the 13th day of May, 1866. The affidavit of Mr. Johnson was made on the seventh day of the said month of May. He stated positively as a fact, that the said defendants, at that time, were non-residents of this State, and resided at the place mentioned in the affidavit of Mr. Burnett. It is claimed on behalf of the purchaser, that Mr. Johnson's affidavit being entitled in a different suit, could not be used in this. In that, I think, he is mistaken. The Code requires that it shall appear "by affidavit, to the satisfaction of the court or a judge granting the order, that the person on whom the service of the summons is to be made, cannot, after due diligence, be found in this State," and I see no good reason why that may not be shown by an affidavit properly made, and forming a part of the records of the court, although not in the particular action in which the order is asked. That may, in many cases, afford more satisfactory evidence of the fact, than any proof that could otherwise be obtained. It appears to be the practice in England, to read affidavits in one suit, that have been used in another, on certain applications (see *Langston v. Wetherell*, 14 *Mees. & W.*, 104); and I am of opinion it is allowable on an application for orders of publication, and of a

like nature. The objection to it appears to be a matter of form merely, and not of substance.

I shall, therefore, hold that the affidavit of Mr. Johnson was properly before the court, and that it, with the facts stated positively by Mr. Burnett, authorized the order.

In so holding, I agree with the counsel of the purchaser, that the allegation made by Mr. Burnett, on information and belief merely, is not evidence; but the absence of the defendants from the State, is, as I understand his affidavit, positively stated by him; and that is a fact which affords at least some proof that they could not be served therein, with the summons. This case being an action for the foreclosure of a mortgage, the non-residence of the defendants was not necessary to be shown. It was sufficient to establish the fact satisfactorily, that they could not, after due diligence, be found within this State, so as to enable the plaintiff to effect the service of the summons on them, and that the case came (as it clearly did) within the fourth subdivision of section 135, which is distinct from the third subdivision, having reference to non-residents of this State.

It is to be presumed, from the fact of making the order, that the affidavits recited therein afforded satisfactory evidence to the court of those requisites, and the omission so to state in the order does not affect its validity.

I am therefore of opinion, that the second ground of objection to the proceedings is not well founded.

III. The third objection is based on the fact, that a copy of the order *nisi* appointing the guardian *ad litem* of the non-resident infant defendant, was deposited in the post office two days before the order and the affidavits on which it was founded, were filed.

It appears, however, that the order was made on the day of the deposit, and the omission to file it until a subsequent day does not invalidate the proceeding.

According to our present practice, an order and the affidavits on which it was founded, must, in many cases, be taken to a distant county, and it is often impossible to file them in the proper office, on the same day the order is made. That, however, is effectual, when filed, from the time it is granted.

The previous deposit is, at most, an irregularity that can be

Silleck v. Heydrick.

remedied at any time, by filing the order *nunc pro tunc*. This, however, is not necessary. No guardian was ever appointed, on the application of the infant, or of any relation on his behalf, and the original order *nisi* became effectual. The original appointment of the guardian, has, moreover, been confirmed by the court.

An answer was put in by him for the infant, and judgment has been entered. Under such a state of facts, the regularity of the appointment of the guardian cannot now be questioned (*Rogers v. McLean*, 31 *How. Pr.*, 279).

It follows that the last ground on which the purchaser asks relief, is not available for that purpose.

I am thus, after a full consideration, brought to the conclusion that the application of the purchaser must be denied.

SILLECK *against* HEYDRICK.

Supreme Court, Second District; Special Term, 1866.

SERVICE BY PUBLICATION AND MAILING.

The fact that the summons and complaint are mailed before the *filing* of the order for service by publication and mailing, does not invalidate the service.

Motion to discharge purchaser at a judicial sale.

This action was brought, by Daniel C. Silleck, administrator, &c., of Adelia Silleck, and another plaintiff, against Jesse A. Heydrick, and others, for foreclosure of a mortgage; and after judgment and sale, the purchaser objected to the regularity of the proceedings, and moved to be discharged.

Wm. H. Arnoux, for the motion.

Brainard, Rice & Burnett, opposed.

Bean v. Pettingill.

LORT, J.—This is an application by a purchaser to be discharged from a purchase of mortgaged premises, sold under a judgment of foreclosure and sale, on the following grounds:

I. That the affidavit on which the order for the service of the summons on the owner of the equity of redemption by publication was granted, was insufficient.

II. That no copy of the summons and complaint was mailed to the parties to be served by publication, according to the terms of the order.

III. That no copy of the order, appointing a guardian *ad litem* of the non-resident infant defendant, was served, according to the terms of the order.

The first and third, of the above objections, were fully considered by me, in the case of Cyprian S. Barnard, against these same defendants,* and were considered unavailable.

The fact that the deposit of the summons and complaint was made before the order directing it was filed, does not invalidate the proceedings. Most of the remarks, made in the other case, in relation to the third objection, apply to this objection.

Upon the whole, I am of opinion that the application must be denied.

*Affirmed
7 Robt. 7*

BEAN *against* PETTINGILL.

New York Superior Court; Special Term, November, 1866.

INJUNCTION TO STAY SUMMARY PROCEEDINGS.

An injunction will not be issued to restrain a landlord from taking summary proceedings to dispossess his tenant, where the grounds on which it is sought do not raise any question which may not properly be inquired into by the magistrate before whom the proceedings are taken.

Motion for an injunction.

Bean v. Pettingill.

Samuel M. Pettingill and another, owners of a house in the city of New York, commenced summary proceedings under the statute to regain possession thereof, from the tenant Mary Y. Bean, on the ground that she was holding over after the expiration of her term. Their application for a warrant to dispossess the tenant was made to Hon. A. D. RUSSEL, city judge of the city of New York. Pending the proceedings, the tenant brought the present action for an injunction.

E. W. Dodge, for the plaintiff, now moved for an injunction to be continued until the trial of the cause;—citing *Story's Eq. J.*, 240.

Amos G. Hull, opposed;—Cited 2 *Rev. Stat.*, 514; 2 *Laws of 1857*, 509; *Niblo v. Post*, 25 *Wend.*, 280, 284; *Benjamin v. Benjamin*, 5 *N. Y. [1 Seld.]*, 383; *Seebach v. McDonald*, 11 *Abb. Pr.*, 95; *S. C.*, 21 *How. Pr.*, 224; *Duigan v. Hogan*, 1 *Bosw.*, 645; *Hyatt v. Burr*, 8 *How. Pr.*, 168; *Crary's Sp. Pro.*, 467.

BARBOUR, J.—This action is brought to obtain a judgment, whereby the defendants shall be enjoined and restrained, until the 1st of May, 1867, from prosecuting certain summary proceedings, which have been instituted against the plaintiff by the defendants, to remove her from a dwelling-house occupied by her as a tenant, upon the alleged ground that she is holding over after the expiration of her term. The motion before me now is for an injunction until trial and judgment in this action.

The complaint sets forth a lease, under seal, whereby the premises are let to the plaintiff for the term of one year from the 1st of May, 1866, which lease contains the following provision: "The said party of the second part covenants * * * to vacate said premises at any time upon receiving ten days' notice from said parties of the first part, at their option," and also a further provision by way of agreement, which declares that if default shall be made in any of the covenants contained therein, the lessors may re-enter the premises and remove all persons therefrom. The summary proceedings in question are alleged to be based on the giving of the ten days' notice, and the refusal of the plaintiff to leave the premises after that period had expired.

Bean v. Pettingill.

The complainant also alleges that previous to any such notice being given, the defendants promised and agreed to and with the plaintiff, that they would waive the ten days' covenant, and permit her to occupy the premises the whole of the demised term, in consideration of an undertaking on her part, that if such waiver were made, she would repair and improve the premises at her own expense; and the plaintiff further avers that prior to the giving of such notice the repairs so contemplated were made by her. To support the case so made by the complaint, several affidavits have been read on this motion.

I think the motion should be denied upon the following grounds: There are two questions which the magistrate before whom the summary proceedings for eviction are now pending, will be bound to determine upon the trial before him: First, whether the relation of landlord and tenant exists, as stated in the complaint before him, and, Second, whether the tenant is holding over after her term has expired. As to the former, there will of course be no difficulty. The latter fact will be established, *prima facie*, by the lease itself, proof of notice to quit, and a refusal of tenant to go. But if the defendants in those proceedings shall succeed in establishing the fact that the landlords, for a sufficient consideration, had, prior to any notice, agreed even by parol with the tenant, to waive and abandon their right to give the ten days' notice, or in other words, had undertaken that they would not exercise such right, it will follow that at law as well as in equity the subsequent giving of the notice in violation of that agreement must be held to be void and of no effect, and therefore that the tenant is not holding over contrary to the terms of the sealed lease. There is not a single question raised by the complaint in this action which may not properly be inquired into and determined by the magistrate before whom the summary proceedings have been instituted. He has full jurisdiction to hear and determine all those questions, and for that reason this court ought not by its injunction to restrain the plaintiffs in the summary proceedings from prosecuting the same.

The motion must be denied, with ten dollars costs.

BIRD *against* HAYDEN.

New York Superior Court ; General Term, November, 1863.

INDIVIDUAL LIABILITY OF OFFICERS OF CORPORATION.—JURISDICTION OF FOREIGN STATUTE ACTIONS.

The personal liability for debts of a corporation, imposed upon its *officers* who fail to perform a duty with which they are charged by the charter, is in the nature of a penalty.

Hence, the courts of this State have not jurisdiction of actions to enforce such liability, where the charter creating it was granted by another State.

The personal liability of *stockholders*, where they are made liable, is an original liability : and an action against them is upon their contract, made by them in a qualified corporate capacity : but where the corporate capacity is not thus qualified, and the members or officers are not liable as original or principal debtors, but by reason of something imposed on them by the statute, the action must be upon the statute, to recover a debt in the nature of a forfeiture.

Exceptions taken at the trial, and directed to be heard in the first instance at the general term.

The defendant, Henry H. Hayden, was a director of "The Daggett Manufacturing Company," a corporation formed under an act of the legislature of the State of Massachusetts, entitled "An act relating to joint stock companies." A provision of the act requires that the *officers* of the corporation shall annually, in the month of January, make and file a certificate, verified by the oaths of the president and a majority of the directors, containing a statement of stock paid in, amount invested in real and personal estate, the amount of existing debts, &c. In case of any neglect, or refusal to perform such duty, the officers of the corporation are *declared by the act to be jointly and severally personally liable for the payment of the debts of the corporation contracted after such neglect and before such certificate shall be filed.*

Bird v. Hayden.

The action was brought by Oliver W. Bird, to recover the amount of two promissory notes, made by the company in August, 1860. The company was formed in April, 1857. No such certificate as the act required, was ever filed by the company.

The cause was tried on the 13th of May, 1863, before Mr. Justice MONELL and a jury.

On the closing of the plaintiff's case, the judge dismissed the complaint, on the ground that the courts of this State had no jurisdiction to try the action, the cause of action being in the nature of a penalty, prescribed by the statute of another State. The plaintiff excepted.

The judge directed the exceptions to be heard in the first instance at the general term, and suspended the judgment in the mean time.

John Sessions, for plaintiff.—I. We have the right to say that the contract in question was made—not in Massachusetts, but in this State—that the paper was made there to be used here, as it was used.

II. The decision in this case was controlled by the case of *Derrickson v. Smith*, which is not authority here. It must rest now upon the same grounds as the argument of counsel—the accuracy of its reasoning. In that case significant stress is laid upon the fact that there, the liability of the officer did not attach until after the debt was created, while in this case he was liable at the instant, and that liability went with the original delivery, and the person receiving the paper had the right to take it—and we may say he, in fact, *did take it solely upon the faith of that liability*. In *Derrickson v. Smith*, it is conceded, as it must be conceded, that when the transaction partakes of the nature of an engagement, the objection to jurisdiction is invalid; and if the original deliverer had a right to take the paper on the faith of the liability of the officer, it could only be as an engagement, and, if necessary for his protection, the officer will be estopped from denying the engagement.

III. That case, when carefully examined, will be found to rest upon the strange fallacy that this liability is imposed upon the officer—not as a liability or contract, but as a punishment; not for the protection of the *few with whom they deal*, whether

Bird v. Hayden.

in Boston or New York, but for the protection of *the people* of the commonwealth of Massachusetts, the great body of whom, from the very nature of their avocations, cannot be injured; not for the protection of the creditors of the corporation, but the morals of the people of the State. The rule of law from which this fallacy has arisen was, that penalties imposed by the laws of a State for the double purpose of punishment, *and of replenishing the public treasury*, could not be prosecuted in a foreign State. The principle upon which that rule was founded is obvious—it is impossible, upon familiar principles of law, to carry that rule where the principle on which it rests—after whatever refinement of learning or efforts of ingenious sophistry—is found to be utterly wanting. I beg to be understood as not for a moment losing sight of the fact that not only naturally but necessarily, in a general sense, must a local judicial establishment or creation, be limited in its jurisdiction, to the same territorial laws as the power that created it—but my argument is drawn from the simple fact that jurisdiction is given to such cases at all—and that when given it is because the wants, the necessities, or the conveniences of commerce require it—and when that distinction is appreciated, the argument is complete and scarcely needs any further illustration.

If it is suggested in answer to us that local laws cannot travel, we reply: (1.) Then certainly corporations cannot. (2.) But they do essentially, when they have their notes in circulation out of their own State. (3.) But the argument is fully answered by the cases sustaining actions against stockholders brought in another State, and which are cited in *Derrickson v. Smith*. The authorities of this State cited by the court are relied on, upon the part of the plaintiff here (See argument of Mr. O'Connor, in *Molony v. Dows*, 8 *Abb. Pr.*, 316; *Ex parte Van Riper*, 20 *Wend.*, 614; *Corning McCullough*, 1 *Com.*, 47).

IV. The courts of our State entertain jurisdiction of actions to enforce the obligations of citizens of a foreign State, *made there*, for the benefit of commerce, and when the State is essentially foreign, while here in a purely commercial sense, there is no foreign State, but essentially one State, one people, one commerce and one intercourse. No natural, physical or governmental line can be drawn to obstruct the commercial intercourse of the people of New York and Boston. They are even

protected and encouraged in their commercial intercourse by the same general laws and government. Then separate municipal and judicial establishments do not make them foreign nations, and are, at best, artificial and accidental. A corporation of Massachusetts' creation, organized by citizens of New York doing business in New York, is a fiction there but a reality here; and to allow them the benefits which may attach to the fiction, divested of the responsibilities which attach to the reality, is to make Massachusetts at once a foreign nation and a public enemy, inasmuch as she furnished to our citizens both the inducement and the means to commit frauds upon each other, and crime here.

V. It is believed to be fully settled that jurisdiction will be entertained by the courts of our State, arising upon a transaction in any foreign State, when the transaction is purely commercial, or relates solely to property, except when there are obvious objections as in case of real actions, and in all cases of mere contract even as to lands.

VI. In cases like the present, it is peculiarly necessary that jurisdiction should be entertained. It is demanded on account of recent rapid multiplication of this class of corporations.

P. G. Clark, for defendant;—Cited *Scovill v. Canfield*, 14 *Johns.*, 338; *The Antelope*, 10 *Wheat.*, 66, 123; *Story on Confl. of L.*, §§ 620, 621; *Derrickson v. Smith*, 3 *Dutcher*, 166; and see 5 *Gray*, 599.

BY THE COURT.*—MONELL, J.—Actions to recover penalties, or forfeitures, created by statutes of other States, being local, are not cognizable by the courts of this State. This is understood to be well settled (*Scovill v. Canfield*, 14 *Johns.*, 338; *United States v. Lathrop*, 17 *Id.*, 4; *Story on Confl. of Laws*, §§ 620, 621), and was conceded by counsel on the argument,

It is claimed, however, that this is not such an action; but that it is an action to recover upon a *contract* made by the company, which, by force of the statute, the defendant has become individually liable to pay.

There is nothing in the act of incorporation of this company which renders the directors or stockholders liable in the first

* Present, BOSWORTH, Ch. J., and WHITE and MONELL, JJ.

Bird v. Hayden.

instance for the debts of the company, as there is in the general banking and other laws of this State. There is no personal liability, if the company fails to pay, and hence there is no right of action against the stockholders for any debt contracted by the company, nor against the officers, so long as they discharge the duty imposed upon them by law. It is only upon their neglect or refusal to perform such duty, that they render themselves liable.

The personal liability of stockholders, when they are made liable by the charter or act of incorporation, is from the inception of the debt. They become originally liable; and the happening of no event, is necessary to charge them. The company is invested with a qualified corporate capacity, but no immunity or exemption from personal liability for the debts of the company is conferred upon the stockholders. In those cases, in judgment of law, the debt is contracted upon the terms and security authorized by the statute, and the creditor, having exhausted his efforts to collect from the company, may resort, by a common law action, directly to the stockholder, not to recover a penalty or forfeiture, nor upon a cause of action in the nature of a forfeiture, but to recover a simple contract debt, for which he was liable at the time the debt was contracted. The action in that case is not *upon* the statute, and a mere reference to it is all that is necessary to show the connection of the stockholder therewith, and the liability it creates.

But where there is no qualification to the corporate capacity of the company, and where the stockholders are not answerable to the creditors of the company as original and principal debtors, but they, or the officer, became liable by reason of some act, the performance of which is imposed on them by the statute, then the action must be *upon* the statute, to recover a debt in the nature of a forfeiture, for a failure to perform a duty. In the one case the absence of any immunity from personal liability renders the shareholder liable when the debt is contracted; in the other the director's liability is created by his own act or omission to act.

It seems to me very clear, therefore, that the personal liability imposed upon the officers of a corporation, who shall have neglected or refused the performance of a duty, with which

Bird v. Hayden.

they are charged by the statute, is in the *nature* of a penalty, and was designed as a *punishment* for such neglect. Such is the plain import of the language of the statute. The directors shall file a certificate, and if they refuse or neglect, they shall *forfeit* to the creditors the amount of their respective debts. The object of requiring a certificate to be filed, was to enable all who thereafter dealt with the company, to ascertain its pecuniary condition; hence, the penalty goes to such creditors as may have been deprived of this source of information.

A charter, or an act of incorporation, is doubtless a contract: nevertheless, penalties and forfeitures may proceed from it; and where the charter is conferred by public law, and the penalty is created by public law, it becomes, to all intents, a penal statute, and if the general manufacturing law of Massachusetts had ordained, that if the directors neglected to file a certificate they should forfeit ten thousand dollars to the use of the creditors, the statute would not have been any more penal than in the form it now has. In either case, it must be a penalty or forfeiture, and must be sued for and recovered as such.

The case of *Corning v. McCullough* (1 N. Y. [1 Comst.], 47) involved the consideration of this question, and received a very careful examination by the court. The ninth section of the act incorporating the Rossie Galena Company provides that the stockholders of the company should be jointly and severally personally liable, for the payment of all debts contracted by the company. The question was, whether the statute limitation of three years in bringing an action upon a statute made for a *forfeiture* or *penalty*, given in whole or in part to any person who would prosecute for the same, applied to that case. The court, in a very elaborate opinion, delivered by the late Chief Justice JONES, held, that to come within the statute, the action must be *on* the statute for a forfeiture or cause, the benefit and suit whereof is limited wholly or in part to the party aggrieved. The learned judge says, "I think the intention of the legislature to have been, to apply them to forfeitures, and penalties, and causes of action of the like character, *partaking* of the character of penal actions."

The distinction between the original liability of stockholders, and such as attaches to officers for neglect of duty, is clearly drawn, and constantly kept in view in the case referred to; and

Bird v. Hayden.

it is held that in the former case, the stockholders being original debtors, are liable as co-partners, and are not exempted by the corporate capacity of the company; and in the latter, that their liability not being original they could only be charged by their own act. In the one case, the action was a common law action for the recovery of the debt; in the other, it was upon the statute, for the recovery of the penalty. The court say—"The liability of this defendant to these plaintiffs is neither for a penalty *inflicted upon him for any offence committed by him*, nor for any forfeiture *incurred by him*, nor does it possess any element or feature of a penal character, assimilating it to either forfeiture or penalty." Again, "It is the policy of the statute to limit the commencement of actions for forfeitures and penalties to shorter periods of time than actions on contracts, and for vested rights, *and legislative enactments subjecting the aggressor to a specific measure of damages, or a specific compensation for the injuries he causes*, may be in their nature penal."

Ex parte Van Riper (20 *Wend.*, 614) is fully sustained by *Corning v. McCullough*. There Van Riper, a director of the bank, was personally liable. The fourteenth section of the charter provided that the president and director should jointly and severally be and continue liable, individually to every creditor, for the payment of the debts of the bank; and the court held, that the liability was original, and not incurred by any subsequent act. This case is referred to, and approved by Mr. Justice BRONSON, in his concurring opinion in *Corning v. McCullough*.

In both these cases the line is distinctly drawn between the original personal liability of the stockholder or director, created by the charter or act of incorporation, and such liabilities as attach by some subsequent act of the officers.

In *Garrison v. Howe* (17 *N. Y.*, 458) the defendant was sought to be charged as a *trustee* of a manufacturing company. The act of incorporation required the trustee to make and file an annual report, &c, and declared that for any neglect to do so the trustees should be individually liable for the debts of the company. The trustees neglected to file their report. The question of jurisdiction did not arise, but DENIO, J., says, "if the statute was simply a *remedial* one, it might be said that

Bird v. Hayden.

the plaintiff's case was within the equity: for the general object of the law doubtless was, besides enforcing the duty of making reports for the benefit of all concerned, to enable parties proposing to deal with the corporation, to see whether they could safely do so. *But the provision is highly penal*, and the rules of law do not permit us to extend it by construction to cases not fairly within the language."

In a recent case in this court (Merchants' Bank of New Haven v. Bliss, 13 *Abb. Pr.*, 225), a question similar to that in *Corning v. McCullough* (*supra*) arose. The defendant was sued as a trustee of a manufacturing company organized under the general law of this State, which contains, substantially, the same provision respecting the duty of the trustees to make and file a report, and their personal liability for not doing so, as are contained in the Massachusetts law, and he was sought to be made liable, by reason of the trustees having failed to make their report. The inquiry was, whether the statute limitations of three years for actions upon a statute for a penalty or forfeiture, applied, and it was held that it did. The court, in elaborate opinions delivered by two justices, decided that the action was necessarily upon the statute to recover a penalty, or forfeiture.

This question has also been very carefully examined, and fully considered by the supreme court of New Jersey (*Derrickson v. Smith*, 3 *Dutch. (N. J.)*, 166). It arose under our general manufacturing law; and the defendant was sought to be held liable in that State, the corporation being located, and the neglect of the officers having occurred in this State. The court held the action, was for a penalty, and could not be maintained in that State. The case is well supported on principle, as well as by the authority of the cases I have above referred to.

The examination I have been able to give this subject has strengthened and confirmed the views I entertained at the trial, and I see no reason now to change them.

The exceptions should be overruled, and judgment directed for the defendant.

Lindsley v. Simonds.

Overruled
23 Nov 209

LINDSLEY *against* SIMONDS.

Supreme Court, First District ; Special Term, September, 1866.

PLEADING.—COMPLAINT AGAINST STOCKHOLDERS FOR DEBT OF CORPORATION.—INDIVIDUAL LIABILITY.

In an action against the owners of stock in a corporation formed under the general law authorizing the formation of corporations for manufacturing, mining, mechanical, chemical, and other purposes, to charge them with debts of the corporation, a general allegation that the corporation was formed under that act, is sufficient, without stating the particular purpose for which it was formed. The general allegation that it was formed under the statute imports that it was formed for one of the purposes specified in the statute.

An allegation that a business corporation, for value received, made and delivered a promissory note, sufficiently states a valid contract. It may be presumed, upon demurrer, that it was done for a legal consideration, under the general powers common to such corporations.

Section 24 of the general law authorizing the formation of manufacturing, &c., corporations,—which requires suit to be brought against the company before an action to enforce the personal liability of stockholders can be maintained,—is to be construed as requiring the recovery of judgment, and the return of execution unsatisfied, in such suit. Hence the complaint in an action against stockholders, must allege judgment and execution unsatisfied. Alleging, according to the terms of the statute, that a suit for the collection of such debt was brought against the company, within one year after the debt became due, is not sufficient.

Demurrer to complaint.

This action was brought by Leonard B. Lindsley and others against Frederic W. Simonds and Abraham Edwards, to charge them as stockholders, with certain debts of their corporation.

The allegations of the complaint were as follows:—

That the European Petroleum Company is a corporation organized under an act of the legislature, passed April 17, 1848, entitled “an act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes,” &c.,

Lindsley v. Simonds.

and the amendments thereto, and was so organized on or about the month of December, 1864.

“That on the 10th day of June, 1865, the defendants were stockholders in said company, to the amount of two hundred shares of the capital stock thereof, at the par value of ten dollars each share, which they owned jointly, and that the capital stock of said company was fixed and limited at one hundred thousand dollars, divided into ten thousand shares, of the par value of ten dollars each share.

“That on said 10th day of June, 1865, the whole amount of the capital stock, fixed and limited by said company, had not been paid in, but that, on the contrary thereof, there was upwards of one half of said capital stock of said company, so fixed and limited as aforesaid, that was not then paid in, nor agreed to be paid in, and has not since been paid in.

“That on said day, said company made their thirteen promissory notes in writing, duly stamped, all of them bearing date on that day, and payable to the order of L. E. Lahens, wherein and whereby they promised to pay by six of said notes, to the order of said L. E. Lahens, nine thousand one hundred and sixty-three dollars and seventy-one cents, in the aggregate, in sixty days from the date thereof, for value received; and by the other seven of said notes, they promised to pay to the order of said L. E. Lahens, nine thousand one hundred and eighty-seven dollars and ninety cents, in the aggregate, in ninety days from the date thereof, for value received; and delivered the same to the said payee thereof, who endorsed the said notes to the plaintiff.

“That when the said notes became due, they were none of them paid, wherefore the said company made their thirteen promissory notes in writing, duly stamped, all of them bearing date on the 12th day of August, 1865, wherein and whereby they promised to pay by six of said notes, to the order of L. E. Lahens, nine thousand one hundred and sixty-three dollars and forty-one cents, in the aggregate, in sixty days from the date thereof, for value received; and by the other seven of said notes, they promised to pay to the order of said L. E. Lahens, nine thousand one hundred and eighty-seven dollars and twenty cents, in the aggregate, in thirty days from the date thereof, for value received; and the said payee thereof endorsed the said

Lindsley v. Simonds.

notes to the plaintiff, in renewal of said first mentioned notes; and although the said notes became due and payable before the commencement of this suit, yet the said company have not paid the same, nor any part thereof.

“And the plaintiffs say that they are now the lawful owners and holders of the said notes, and that the said company is now justly indebted to them thereupon, in the full amount thereof, with interest from the time the same became due, and that a suit has been brought against said company by said plaintiff, for the collection of said debt in this court. Wherefore,” &c., (demanding judgment).

Gilbert Dean, in support of the demurrer.—There is no averment in the complaint that the purposes of incorporation were for any of the objects named in the statute, viz.: “manufacturing, mining, mechanical or chemical business,” &c. This is essential. A stockholder in a corporation for carrying on any business not specified in this law would not be personally liable under the law, but all the associates would be partners, and he could, if sued, take advantage of the non-joinder of the others, on demurrer.

II. This action is founded on section 10 of the general manufacturing act—which is highly penal, and must therefore be *strictly construed*. This being the settled law in reference to penal statutes, the complaint is defective in three particulars:—1. It does not state that the company, at the time of making the notes, were indebted to the payee in any sum. 2. It does not state that the company had made any contract to pay him any sum. 3. It does not aver that any liability of the company had been established by the acts of the company or the judgment of a court.

III. It is necessary, before recovery can be had under this statute, to aver and prove that the stockholder was such at the time the debt was contracted, and also that the debt has been established as one binding upon the company, by a valid judgment against the corporation.

IV. It is necessary to aver that a judgment has been obtained, that the plaintiff has issued an execution, and that the same has been exhausted against the company.

George C. Genet, for the plaintiffs.

Lindsley v. Simonds.

DANIELS, J.—This action is brought by the plaintiffs, as creditors of the European Petroleum Company, against the defendants, as owners of a portion of the capital stock. The corporation is alleged to have been formed under the general law of this State providing for the organization of manufacturing, mining, mechanical, and chemical corporations, but the particular purpose and object for which it was organized is nowhere stated in the complaint, which is one of the defects relied upon in support of the demurrer. It is generally alleged that the corporation was formed under that act; and that is sufficient to warrant the conclusion that it was for one of the objects or purposes contemplated and allowed by the act, for it could not be otherwise formed under that act. The objects for which corporations may be formed under that act are specifically declared, and unless the company is formed for the promotion of one or more of such objects, it could not be true that it was organized under the act. The allegation must therefore be construed as substantially declaring what must be fairly understood and implied from the language it uses—that the corporation was formed for one of the purposes allowed and defined by the statute; for courts are not allowed to presume a violation of the law, even against a corporation—on the contrary, the presumption is the other way, where presumptions are entertained.

The next objection to the complaint is that which arises upon the allegation of the demand owing from the corporation to the plaintiffs. By that it is alleged that the corporation, for value received, made and delivered certain promissory notes, which were afterward indorsed to, and at the time when the suit was commenced were held and owned by, the plaintiffs. The defendants maintain that this does not disclose the existence of a demand legally binding upon the corporation itself. And the defendants are not liable, even though they were stockholders when the claim was created, unless the corporation was legally liable for its payment. But corporations formed under this statute, like others, have the power of incurring debts and other liabilities arising out of contracts. And, as incidental to that power, they may, when such liability is created, execute and deliver their promissory note or notes, on account of it (*Moss v. Averell*, 10 *N. Y.* [6 *Seld.*], 449). And when, as in this case, it is alleged that the corporation executed and delivered its

promissory notes, for value received, it may without impropriety be assumed, that it was done for a legal consideration under the powers with which it was by law invested, and in the course of the transaction of its legitimate business; and notes so given by it would be legally binding upon it. When a corporation has power to enter into an agreement, it is presumed by the law in favor of the validity of the agreement made, where the contrary is not made affirmatively to appear, that it was made in the proper exercise of such power, and not that the corporation exceeded its powers or violated the law (*Farmers' Loan and Trust Company v. Curtis*, 7 *N. Y.* [3 *Seld.*], 466; *Chautauqua County Bank v. Risley*, 19 *N. Y.*, 369, 379-382).

Under the allegations in the complaint, therefore, the corporation is shown to be liable upon the notes of which the plaintiffs were the holders.

But the defendants further object that the complaint does not exhibit a legal cause of action against them, even though it may against the corporation in which they were stockholders at the time when the debt was contracted; because it does not show that judgment had been rendered against the company, and an execution returned upon it, in whole or in part unsatisfied; and this presents the more material and difficult question arising in this case.

The statute declares that the stockholders in every company incorporated under it shall be severally and individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made by the president and a majority of the trustees, and recorded in the office of the clerk of the county in which the business of the company is carried on. (*Laws of 1848*, ch. 40, §§ 10-11, *Same Stat.*, 1 *Rev. Stat.*, 4th ed., 1216, §§ 28-29, or 2 *Id.*, 5th ed.) And the complaint in this case contains the proper allegations, showing that the capital of the corporation in question was not paid in, and that no certificate showing it to have been paid was ever made or recorded. The object of the legislature in requiring the payment of the capital of the company was to secure to those

Lindsley v. Simonds.

dealing with it the means of satisfying the obligations it might ordinarily be expected to incur, and, in case of a failure to observe the requirements of the law in that respect, to impose a corresponding liability upon those whose default occasioned such failure. The real contracting debtor in all such cases is the corporation, and the liability of the stockholders is subsidiary or incidental to that, not arising out of any contract or obligation entered into by them, in terms, with the creditor, but originating in and arising out of their default in not securing the full payment of the corporate capital. Under such a state of the case, it would ordinarily and reasonably be expected that the creditor should be required to resort to his immediate and actual debtor, by the contract, for the satisfaction of the demand arising out of it, before he could be at liberty to resort to the stockholders, whose liability is of a secondary character. And, in conformity with that expectation, it will be found that the general laws providing for the formation of corporations in many cases explicitly require that the creditor shall exhaust his remedy against the corporation itself before he is at liberty to proceed against the stockholders who have made default in the payment of the corporate capital. The statutes providing for the formation of telegraph companies, ocean navigation companies, lake and river navigation companies, stage companies in the city of New York, and plank and turnpike road companies are of this description (2 *Rev. Stat.*, 5th ed., 740; § 10, 789; § 9, 799; § 29, 912; § 10, 507; § 129). But that system of legislation has not been uniformly followed; for in some cases the stockholders are made absolutely liable for the debts of the company, without any proceedings being first taken against it. That is the case respecting subscribers to the cash capital of certain insurance companies, shareholders in building and loan associations, ferry companies and in mining and guano companies, and those formed for improving the breed of domestic animals (2 *Rev. Stat.*, 5th ed., 750; § 22, 752; § 30, 783; § 11, 809; § 70, 822; § 11, 825; § 7). While the liability of stockholders in gas light and building companies is declared in substantially the same terms as those which are used to define the liability of stockholders in manufacturing corporations.

Under this diversity in the laws which relate to this liability,

Lindsley v. Simonds.

no presumption can be entertained that the legislature intended to adopt any uniform, general system for the regulation and government of it. In most cases the liability of the stockholder is made to depend upon similar circumstances, but in many others it arises out of circumstances altogether different. The intention of the legislature must, therefore, be searched for in the objects of the statute, and the terms employed to express that intention, rather than in any general system it might reasonably be supposed would be adopted on this subject, extending alike to all similarly formed corporations.

The only section of the general law under which the corporation in question was formed which bears directly on the solution of the present question, is that which declares that "No stockholder shall be personally liable for any debt contracted by any company formed under this act, which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due; and no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company, for any debt so contracted, unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder in such company, nor until an execution against the company shall have been returned unsatisfied in whole or in part" (2 *Rev. Stat.*, 5th ed., 663, § 47). The literal reading of this section of the statute is against the construction claimed for it by the defendants. But statutes are not always to be construed according to their literal reading. Ordinarily that will secure a very safe guide by which the legislative intent may be ascertained. But where that intent is doubtful, the general policy and scope of the statute may properly be considered for the purpose of discovering it, and when that intent is discovered it must be followed, even though it may fail to harmonize entirely with the literal reading of the law, for whatever is within the spirit or intent of the law is within the law itself, although not within the letter, while that which is within the letter and not within the spirit or intent is not within the law.

The general policy and object of these provisions of the law were to insure to the creditors adequate and efficient remedies

Lindsley v. Simonds.

for the payment of the debts incurred by the corporation, which is consistently and justly accomplished by rendering the remedy against the stockholder dependent upon the failure to acquire satisfaction from the corporation by the ordinary means of legal proceedings. For if the stockholders can be resorted to in the first instance, many cases would arise where the secondary or subsidiary debtor would be compelled to pay the debts, when the corporation would be entirely solvent and able to make payment of them itself; which could not fail to introduce uncertainty and confusion in the affairs of these institutions. These considerations to some extent indicate the probability that the legislature did not intend that the stockholders should be sued until the legal remedy of the creditor against the company had been ineffectually exhausted, and the general frame and scope of this section seems to warrant the same conclusion; for according to its literal reading, it requires a judgment against the company, and an execution returned in whole or in part, unsatisfied upon it, before a person who has ceased to be a stockholder after the contracting of the debt can be sued for it; and no good reason can be imagined for requiring a suit in that case, that does not apply with equal cogency to the case of a person continuing to be a stockholder. No object can be accomplished by the judgment and execution against the company in the one case, that justice does not equally require in the other. But this section, it will be seen, goes further, for it expressly requires a suit to be commenced against the company before an action can be brought against the stockholders; and it is averred in the complaint that such a suit was commenced in this case. But a mere suit against the company, not prosecuted to judgment and execution, can be of no benefit whatever to the stockholder, and it would be unreasonable to suppose that such a suit would be required as a condition to the right to maintain an action against the stockholder, if that was all that was intended, for a suit alone would in no way relieve or benefit the stockholder in whose behalf the law expressly requires it. The only object the legislature could have in requiring such a suit, was to compel the creditor to collect his debt in the first instance from the corporation. In that manner alone can it be made of any substantial advantage to the stockholder, and there is no reason for believing his liability would be made to depend on a suit being brought against the company, unless it was de-

signed that the suit should be consummated by a judgment and execution. The fair construction of this section of the statute demands that it should be so read as to require a suit against the company for the recovery of the debt, together with a judgment upon it, and an execution returned in whole or in part unsatisfied, before the creditor can be at liberty to maintain his action against any of the stockholders. And even in that case he cannot maintain the action against a person who has ceased to be a stockholder, unless the suit against him shall also be commenced within two years from the time he ceased to be a stockholder.

Many of the cases that have passed through the courts, in which the personal liability of stockholders has been examined, arose under different statutes from that under which the present company was formed, and some of those arising under this statute were predicated upon the liability of the trustees, for not making and publishing the annual statement required by the law, for which they become liable for all debts contracted while they were in such default, without any previous proceedings whatever against the corporation. But in all those where the party has been charged as a stockholder alone, judgment was averred or proven to have been recovered against the corporation, and an execution returned, wholly or partially unsatisfied, before the suit against the stockholder was instituted. This of course, is not controlling, but it certainly exhibits the judgment of the legal profession to be in favor of the construction placed upon this statute, so far as such judgment has been declared. The length to which this examination of the present case has been extended, renders a detailed examination of the authorities referred to impracticable; and as they have no direct bearing upon its consideration, no useful result could be attained if such an examination should be made. It is sufficient to say that none of them are in conflict with the conclusions already intimated. The question involved is one of very great practical consequence, on account of its rapid increase during the past few years in manufacturing, mining and mechanical corporations, and for that reason it deserved a more extended examination than should otherwise have been bestowed upon it.

The defendants should have judgment on the demurrer, with leave to the plaintiffs to amend in twenty days on the payment of the costs of the demurrer.

The People *ex rel.* Cagger *v.* The Supervisors of Schuyler.

THE PEOPLE *ex rel.* CAGGER, *against* THE SUPERVISORS OF SCHUYLER.

Supreme Court, Third District; General Term, May, 1866.

ACTIONS AGAINST OFFICERS.—MANDAMUS.—AUDIT OF CLAIMS
AGAINST A COUNTY.

An application to the court for a writ of mandamus against public officers must be made within the judicial district in which the action resulting from the issue of such a writ would be triable, or in a county adjoining that in which the action would be triable.

Such an application is not, in itself, a suit or action, within the meaning of 2 *Rev. Stat.*, 353, § 14,—which provides that every action against a public officer, for or concerning any act done by virtue of his office, shall be laid in the county where the fact complained of happened;—but it is to be regarded as a motion, within the spirit of section 401 of the *Code of Procedure*.

All claims against a county must first be presented to the board of supervisors for their allowance. And unless so presented, with proper affidavits, as required by the statute, the supreme court will not interfere in aid of the claimant, by issuing a mandamus to the board.

An affidavit stating that the services claimed for were performed (but not stating that they were rendered for the county), and that no part of the claim had been paid by the board or any one *on their behalf*, is not a sufficient verification, to make it the duty of the board of supervisors to act upon the claim.

When an application for a writ of mandamus, made upon affidavit and on notice, is met by counter affidavits showing that material questions of fact are in dispute, such questions must be determined, before the court can decide the questions of law, and grant a peremptory writ.

The supreme court cannot, upon a mandamus to a board of supervisors, requiring them to consider and act upon an unliquidated claim against the county, fix the amount which they shall allow.

Appeal from an order of the special term, allowing a peremptory mandamus in the first instance.

The application was by motion, on notice, heard at the Columbia county special term, the relators being residents of Albany, an adjoining county.

The People *ex rel.* Cagger v. The Supervisors of Schuyler.

The moving papers show, that by an act of the legislature, passed in 1854, a county was erected from parts of Chemung, Steuben, and Tompkins counties, by the name of Schuyler: that in January, 1859, a cause was pending in the court of appeals, entitled William Rumsey, plaintiff in error, *against* The People, defendants in error, wherein was involved the constitutionality of said act creating said county: that on the 13th day of December, 1858, the board of supervisors of Schuyler county passed the following resolution: "*Resolved*, That the chairman of this board be authorised to draw upon the treasurer of this county for a sum not exceeding one hundred dollars, and that the chairman be, and he is hereby authorized to employ good and sufficient counsel to defend the interests of this county in the court of appeals, in any case involving the constitutionality of the same;"—that the relators were employed to argue the aforesaid cause, and maintain the constitutionality of said act: that they did argue said cause, at the January term of the court, in which case the court held said act constitutional; that said service was reasonably worth the sum of two thousand five hundred and twenty-four dollars; that no part thereof had been paid by the board of supervisors: that on the 25th day of July, 1859, said board passed the following resolution: "*Resolved*, That a committee of two members of this board, consisting of Isaac D. McKeel and Winthrop E. Booth, be, and they are hereby appointed, and whose duty it shall be, to settle and pay the late firm of Hill, Cagger and Porter, of Albany, for preparing and arguing before the court of appeals, the suit of The People *against* Rumsey, which involved the constitutionality of the law erecting this county, the decision of which appeal affected the whole people of the county, and is therefore a proper charge upon the county:" that at such date said claim had been presented, and was pending before said board: that said committee never settled or paid said claim, or any part thereof; that said claim was again presented in November, 1862, but not acted upon, and that said claim, as said affidavits assert, was just and legal, as the affiants verily believe.

The opposing papers denied that the defendants ever employed the relators to argue said cause in the court of appeals, or ever assumed to pay therefor: that the relators were em-

The People *ex rel.* Cagger *v.* The Supervisors of Schuyler.

ployed by one Charles Cook, against whom they now have an action pending for such service ; that the resolution of July 25, 1859, as adopted by the board, did not assume that the relator's claim was a proper charge upon the county : that the committee appointed by it examined into the claim, and reported that it was not a legal claim against the county : that no claim for such services was presented by the relators to the board, previous to 1862, and that the said services were not reasonably worth the sum charged.

Ira Shafer, for relators.

H. B. Smith, for respondents.

BY THE COURT.*—JAMES, J.—The respondents first raised the preliminary objection, that the motion for the writ was not made in the proper county. The statutes provide, that every action against a public officer, for, or concerning any act done by virtue of his office, shall be laid in the county where the fact complained of happened, and not elsewhere (2 *Rev. Stat.*, 353, § 14) : and that, if in such suit it shall not appear on the trial that the cause of action arose in such county, the jury shall be discharged, and judgment of discontinuance shall be rendered against the plaintiff (2 *Rev. Stat.*, 409, § 3). In this matter, the defendants were proceeded against as public officers for an alleged contract, made as such ; therefore, if this proceeding was a suit, or an action, it should have been taken in Schuyler, and not in Columbia county. But I do not think it is, properly, either a suit or an action (1 *Wend.*, 291) ; but a proceeding preliminary to instituting an action in case an issue was formed ; it was a motion, the first proceeding leading to an action, and clearly so within the provisions of the 51st section of the judiciary act of 1847, which authorises such motions to be made in a county, where the parties, or any of them, reside, or in an adjoining county. But I am of the opinion that section 51 of said act is superseded by section 401 of the Code, as now amended. Section 401 declares that an application for an order is a motion (subd. 1) ; and that motions upon notice must be made within the district in which the action is triable,

* Present, BOCKES, JAMES, ROSEKRANS and POTTER, JJ.

The People *ex rel.* Cagger *v.* The Supervisors of Schuyler.

or in a county adjoining that in which it is triable. This was an application for an order, upon motion, and although not a motion in an action, yet it is clearly within the spirit of the section, and should the motion result in an action, it would be such an action as could not be tried in Columbia county, or in any county adjoining it. In this view, the preliminary objection was well taken, and the proceeding should have been dismissed by the special term.

But if this objection were passed, there are insurpassable difficulties in the way of sustaining this order.

It would not be proper on this appeal to discuss the validity of this claim, as against Schuyler county. That is first to be passed upon by the board of supervisors of said county, at its annual session. The board of supervisors is first to act upon all claims against a county; and it is not until after a claim has been presented to such body, properly verified, and they have refused to act upon it, or, having acted, rejected the claim in whole or in part, that the aid of this court can be invoked in behalf of the claimant; and neither stage has as yet been reached in this case.

It is not, however, improper, as the case is presented, to say, that all claims against a county must first be presented to its board of supervisors for allowance. That body is vested by the statute with power to "examine, settle, and allow all amounts chargeable against such county," and provide means for payment (2 *Rev. Stat.*, 5th ed., 548, § 2, subd. 2); and the statute declares that no account shall be audited unless made out in items and accompanied by an affidavit of the person presenting or claiming the same, that the items of such accounts are correct, that the *disbursements* or *services* charged have been rendered, and that *no part* has been paid or satisfied (*Id.*, 855, § 37); and even such an affidavit does not preclude the board; it may require further proof, or disallow the claim in whole or in part (*Id.*, 855, § 38). It is made the duty of such boards to examine, settle, and allow all accounts presented to them, properly chargeable against the county. Theoretically, the board is to examine every claim presented; if properly verified, to determine if it is properly chargeable against the county; if it is, and is for a service the price of

The People *ex rel.* Cagger *v.* The Supervisors of Schuyler.

which is fixed by law, or by pre-contract, to audit it at such sums; or, if unliquidated, to fix the amounts at such sum as in their discretion they should deem just; and then to allow it, and provide means for its payment. This action necessarily implies the exercise of judgment and discretion; it involves the right to reject, or to allow, and, in certain cases, to fix the sum, and is therefore *quasi* judicial (9 *Wend.*, 509).

It is not disputed that this claim was before the board of supervisors of Schuyler county in 1862. The claim, as presented, with the accompanying verification, was made a part of the moving papers on this motion, and it is alleged that the board did not act upon the claim. Unless accompanied by a proper affidavit, the board was not bound to take notice of the claim. The verification did not state that the services charged were rendered for the county, or that no part of the claim had been paid; but asserted that the service was performed, and that no part of the claim had been paid by the board of supervisors, or any one on their behalf. This affidavit was too evasive not to attract attention. While asserting the truth it implied a falsehood from its beginning to its end. It was doubtless an attempt to satisfy the statute without perjury, and gives color to the defendant's allegations that the services were rendered on the employment of another than the county, and that a part of the claim had been paid. It is quite clear that the affidavit accompanying the claim was not such as the statute requires, and hence, there was nothing before the board on which it could or was bound to act. There being nothing before it on which it could act, and not having acted, a mandamus to compel action cannot be granted.

But if the claim presented had been properly verified, and the board had refused to act, the aid of this court could only be invoked, and a mandamus allowed, to set such board in motion. In that case, application could be made *ex parte* for an alternative writ, or for an order to show cause. More modern practice is, to give the ordinary notice of a motion, based upon affidavits, that on the hearing a peremptory writ will be asked for. In that case, if it then appear that no material facts are in dispute, the court may grant or deny the peremptory writ; at once disposing of the questions of law, subject to review on appeal. But if it then appear that material facts are in dis-

The Commissioners' Attachment.

pute between the parties, and that the application has merits, the course is to grant an alternative writ, that issues may be joined, and the disputed facts settled by a proper trial.

In this case, the application was by motion upon affidavits and notice. The application was met by counter affidavits, showing that material questions of fact were in dispute. It was, therefore, erroneous to pass upon the questions of law, and grant a peremptory writ, before the facts were settled. It was not authorized by the law, and entirely unheard-of in practice.

Again, the claim was for services. The value of such services was not fixed by law, nor was the price stipulated by any previous agreement or contract. The claim was, therefore, unliquidated. In such case, the amount is in the discretion of the board of supervisors, whenever they act judicially. The office of a mandamus to an inferior court is to set it in motion—not to require any particular action. Its mandate is, to proceed—adjudicate, or exercise discretion: not designating what the judgment shall be, or how its discretion shall be exercised. The order under review not only requires the board of supervisors to act, but fixes and directs the amount to be allowed. This, also, was clearly erroneous.

For these reasons, the order of the special term should be reversed, and the motion denied, with costs of the motion at special term, and of this appeal.

THE COMMISSIONERS' ATTACHMENT.

Court of Sessions for the County of New York; March, 1865.

WARRANT AGAINST ESTATE OF ABSCONDING HUSBAND.

A police justice of the city of New York has the same power to issue a warrant in that city, to the commissioners of public charities and corrections, against the estate of an absconded husband and father, as two

The Commissioners' Attachment.

justices of the peace have in other counties, to issue such a warrant to the overseers of the poor.

Although a warrant may be issued in such a case against real property, as well as personal property, it cannot be sustained where the only interest of the absentee is a remainder dependent upon an outstanding life estate, and there are no rents or profits accruing to him meanwhile.

Attachment against the estate of an absconding parent.

In February, 1865, upon proof presented by the wife of W. B. that her husband had absconded from her and her children, leaving them chargeable upon the public for support, Police Justice LEDWITH, of the city of New York, issued a warrant under his hand and seal reciting the facts, and authorizing the commissioners of public charities and corrections to take and seize the goods, chattels, effects, things in action, and the lands and tenements of said W. B. wherever the same might be found in the county of New York, and directing them that they immediately make an inventory of the property so seized, and return the same, together with their proceedings thereon, to the next court of sessions of the county of New York. Under this warrant, the commissioners seized the interest of W. B., in the estate devised by his father, to his mother for life, remainder to W. B., his brothers and sisters.

In February, 1865, the commissioners made the return as directed by the warrant; and at the following, the March court of sessions, moved to confirm the seizure.

Charles Henry Smith, for the estate, objected:—(1.) That there was no power on the part of Justice LEDWITH alone to issue the warrant. (2.) That the commissioners had no power to execute such writ. (3.) The writ in question is void, even if Justice LEDWITH had power to issue the statute writ,—because it includes real estate, and choses in action. (4.) The court has nothing to act on, the inventory being only of real estate.

James J. Thomson, for the Commissioners.—I. The provisions of 2 *Rev. Stat.*, 4th ed., p. 10, § 8, give two justices of the peace, upon due proof of facts, authority to issue a warrant authorizing the overseers of the poor to take and seize goods, chattels, effects, things in action, and the lands and tenements of an ab-

scended husband or father. Police Justice LEDWITH is the proper officer to grant the warrant, and a warrant issued by him alone is sufficient. 2 *Rev. L.*, § 24, p. 350, provides for the appointment of three special justices for preserving the peace in the city of New York; and § 41 (p. 354) of same act, invests them with the like powers as exercised by the justices of the peace in the different counties of the State. Justices of the peace were authorized in 1813, by act passed April eighth, to exercise a like power (See 1 *Rev. L.*, 284, § 22). In 1848, the special justices were abolished, and an act was passed, providing for the election of one police justice in each of the judicial districts of the city of New York, and investing them with all the power, and directing them to perform all the duties of the special justices, for preserving the peace in the city of New York (*Laws of 1848*, 250, ch. 103, § 7). By chapter 508 of the *Laws of 1860*, p. 1008, § 6, one police justice is authorized to act in all cases wherein it had theretofore required the action of two.

II. The commissioners of public charities, &c., are the proper persons to conduct the proceedings, execute the warrant, and hold the property seized. By section 246 of the act, of 1813, ch. 86 (2 *Rev. L.*, p. 439), the mayor, &c., were authorized to appoint five freeholders to be overseers of the poor, who were to be denominated commissioners of the almshouse and bridewell of the city of New York, "which said persons * * shall have the same power and authority * * for providing for the poor of the said city, * * and be subject to the same duties and penalties which the overseers in the respective towns in this State have been or are subject to. The commissioners of the almshouse and bridewell were abolished in 1849, and the board of ten governors appointed in their place. The ten governors were invested with all the power and authority by law conferred on and subjected to the duties imposed on the commissioners of the almshouse, the common council, and the board of supervisors, in respect to said department, and said institutions (See *Laws of 1849*, ch. 246, p. 367). The department of public charities and correction, the chief officers of which, who are to be styled commissioners of, &c., succeeded the ten governors—and the act creating them invested the commissioners with every power and authority con-

The Commissioners' Attachment.

ferred upon, and subjected them to all the duties imposed upon the former almshouse commissioners, or the board of ten governors, which may affect or relate to the institutions, their officers or inmates, or the late almshouse department. The act abolishes the almshouse department (*Laws of 1860*, 1026, ch. 510). The overseers of the poor of any city or town, by the act of 1813 (1 *Rev. L.*, 286, § 22, passed April 8), had substantially the same authority in these cases as that conferred by the statute under which this proceeding is brought.

The only cases bearing upon the practice in this proceeding that I have been able to find, are *Downing v. Rugar*, 21 *Wend.*, 185; *People v. Overseers of Triangle*, 23 *Barb.*, 236.

RUSSEL, J.,—without hearing further argument, overruled the objections to the writ, and directed the inquiry and examination to proceed.

The examination was then had; and by the counsel for the estate it was insisted that the interest of W. B. in the real estate could not be seized: it produced no rent, and was neither lands nor tenements.

On behalf of the commissioners, it was urged that the statute authorizes the seizure of "lands and tenements," and the applications of rents *if any*. Suppose the estate to be houses and lots not yet occupied, or tenantless, the commissioners would have a right to seize and hold these, and even rent them; and by the same right, they have the power to hold the estate of the defendant seized by them.

Again. The estate of the defendant is clearly within the common law definition of "lands and tenements." Lands "comprehendeth in its legal signification any ground, or soil, or earth whatsoever, *also houses and buildings*" (2 *Bl. Com.*, 17, 18; 3 *Kent*, 401). A tenement comprises everything that may be holden (3 *Kent*, 401). It is a word of *greater extent than land*: it includes not only lands, but rents, commons, and several other rights issuing out of or concerning land (2 *Bl. Com.*, 17, 18; 3 *Kent*, 401; 1 *Steph.*, 158-9).

Again. The defendant does not pretend that a vested remainder cannot be *holden*, or that he does not *hold* the fee of the real estate, subject to the life estate of his mother. Again.

The Commissioners' Attachment.

The statute is not punitive, but intended to indemnify the city against loss by reason of the supporting of persons who ought to be cared for by individuals, by the seizure of that individual's property, and the devotion of the proceeds, or such part as shall be necessary, arising from the sale of personal, and the rents, if any, arising from the real estate—to the support of the dependants.

RUSSEL, CITY JUDGE.—This case comes before the court on an application under the statute (1 *Rev. Stat.*, Edmond's ed., 9, 10), to confirm the warrant and seizure of the justice, on the application of the commissioners of public charities and correction, against the estate of W. B., who had absconded from his wife, leaving her chargeable, or likely to become chargeable, upon the public for support.

The commissioners, in their return to the court, report that under and by virtue of the warrant issued by one of the police justices in the city of New York, they have taken and seized the *interest* of the said W. B., in certain real estate in the city of New York.

In inquiring into the facts and circumstances of the case, it appears that the said W. B. has an interest in the real estate of which his father died seized, after the death of his mother, to whom, by the terms of his father's will, it is given, with the rents, profits and increase during her life, and after her death it is to be divided equally among nine children.

By the terms of the will, the said W. B., should he survive his mother, would be entitled to one ninth of the property;—should he not, it is directed that his children take his portion. Therefore, there being no personal estate seized, and only the estate dependent on the life of another, and there being no rents and profits coming to the said B. from the estate which can be applied towards the maintenance of his wife, the warrant and seizures are discharged.

PADDON *against* WILLIAMS.

New York Superior Court; General Term, November, 1863.

PARTIES.—ACTION BY ONE IN WHOSE NAME ANOTHER PERSON DOES BUSINESS.—REMEDIES OF THE LATTER.

One in whose name a business is carried on by other persons, in order to protect it and their funds against their creditors, and upon a secret agreement that he shall in fact be only their clerk, must, as between himself and them and persons claiming under them, be regarded as having the legal title to property, or the proceeds of property, intrusted to him by third persons in the course of such business; and he may maintain an action to recover from the persons thus doing business in his name whatever they convert to their own use against his will.

If they have any remedy against his claim that he is the owner of the assets, it is only by an action for equitable relief, in which the rights of persons dealing in good faith with him may be protected, and the sums due them be first paid.

Appeal by the defendants, from an order denying a new trial after verdict against them, and from the judgment entered on the verdict.

The action was brought by John W. Paddon against Isaac Williams and William Menck, to recover the amount of ten bank checks, which the plaintiff alleged in his complaint, were payable to his order and belonged to him, and he had delivered to the defendant Williams, as his clerk, to deposit in bank to the plaintiff's credit, and which Williams embezzled and converted to his own use, with the complicity of the defendant Menck, to whom Williams had delivered them, and who had applied them in payment of a debt due to him from Williams.

The answer of the defendant Williams denied that he was the plaintiff's clerk, and that the checks belonged to the plaintiff, and averred that they belonged to the firm of D. M. Berry & Co., of which firm the defendant Williams was a member, and that the plaintiff was their clerk; and that he, Williams, had taken the checks as his own property. That the plaintiff had long been the clerk of D. M. Berry & Co., who

Paddon v. Williams.

were commission dealers in produce, and when they became so embarrassed that they could not safely continue business in their own names, he induced them to open a bank account, and a new set of books in his name, and enter consignments and deposit moneys accordingly; but that, with these exceptions, it was agreed that the business of the firm should be transacted as it had theretofore been, and the interest of the members of the firm should remain as it then was; the plaintiff to continue in his capacity of clerk, and to be paid the same salary, and in the same way, as it had theretofore been paid. That in pursuance of this plan there was a nominal dissolution of partnership, which it was agreed should not be real, but the relations of the parties were to continue, and did continue, as before, except that the name of the plaintiff was to be used instead of that of the firm. That when defendant demanded an accounting, the plaintiff refused it, and claimed that the business belonged to himself, and that the defendant was a mere clerk of his; and in order to protect himself against such fraud he had appropriated the checks, and that he was ready to account; but denied that anything would be due from him upon an accounting.

The defendant Menck answered, averring that the checks had been the property of Williams, who had delivered them to him in payment of a debt.

The action was tried before Mr. Justice BARBOUR and a jury, on the 12th day of November, 1862.

It appeared that the checks, with one exception, were received in payment for merchandise which had been consigned to John W. Paddon, the plaintiff, by various persons, and which had been accordingly sold.

Upon the opening of the defence, in answer to objections, the defendants' counsel made the following offer of proof.

"We offer and desire to prove—

"That it was agreed between the defendant Williams and the two Messrs. Berry and Mr. Paddon, the plaintiff, that the business of D. M. Berry & Co. was to be carried on by having the goods consigned to D. M. Berry & Co., and sold by them, and the proceeds of all sales deposited in the name of the plaintiff, John W. Paddon; and that the business was so carried on for a considerable length of time. That then there was a pretended dissolution of partnership and an agreement between the same

Paddon v. Williams.

parties that the goods should be consigned to Paddon, and that the business should be done in his name; but, that during all this time the agreement was, between all the parties, including the plaintiff, that the business was to belong to the firm of D. M. Berry & Co., in fact, and that the plaintiff Paddon was to be simply a clerk. The members of the old firm of D. M. Berry & Co. were to take all the gains, and profits, and proceeds of the business, and that that understanding was in operation when Mr. Williams took the checks in question. That he took the checks and turned them over to Mr. Menck, in payment of an individual debt, and that this debt was for the capital which Mr. Williams put into the business."

The court held that the facts constituted no defence, and excluded the evidence, denied a motion to dismiss the complaint as against the defendant Menck, and directed a verdict for the plaintiff.

The defendants moved for a new trial, which being denied, and judgment having been entered on the verdict, they now appealed.

William Fullerton, for defendants, appellants.

William M. Evarts, for plaintiff, respondent.

BY THE COURT.*—BOSWORTH, Ch. J.—No authority is cited by either counsel, in support of any proposition argued on this appeal.

The plaintiff was possessed of ten checks, payable to his own order; he indorsed them, and delivered them to his clerk, the defendant Williams, with instructions to deposit them to the plaintiff's credit, in the Hanover Bank. Williams received them, accompanied with such instructions, and virtually promised to so deposit them. Instead of doing so, Williams transferred them to the defendant Menck. Williams and Menck refusing to return the checks, this action is brought to recover their amount.

It was not contended on the argument that Menck has any defence, unless Williams has. It is quite clear on the evidence that Menck has no rights superior to those which Williams

* Present, BOSWORTH, Ch. J., and WHITE and MONELL, JJ.

had. Clark testifies that on the 7th of March, "Mr. Menck stated that Mr. Williams had come to him before taking the checks, asking what he should do." It was also testified that Menck said to the plaintiff in the interview, when the checks were demanded—"I will come Monday afternoon, at four o'clock; I will come and settle the matter with you. I am free to confess that when I see I am wrong, I am willing to give up." That the settlement was to be a return of the checks, or their equivalent in money. Menck also said, "I have been advised that this money must not be squandered away." All this imports that Menck had notice, when he took the checks, how Williams got them. It was no part of the evidence offered and rejected, that he took them without notice. This brings us to a consideration of the defence. The defence is that, although Paddon was doing business ostensibly as principal, and Williams was apparently his clerk, and it was so represented to the public to induce business, yet in fact the business was that of a firm formerly trading under the name of D. M. Berry & Co., of whom Williams was one; that the plaintiff was, in fact, their clerk, that the checks were, therefore, the property of D. M. Berry & Co., and that Williams, as between him and the plaintiff, had a right to take them, *nolens volens*, and dispose of them as he pleased.

If the property of the old firm of D. M. Berry & Co. was transferred to the plaintiff under the circumstances stated in the answer, it was evidently done to place it beyond the reach of the creditors of that firm. Although the fact would not disable those creditors from reaching it, yet, as between the plaintiff and such firm, the title would be in him, and D. M. Berry & Co. could not reclaim it by legal proceedings; nor defend themselves against a suit for taking it by force.

It would be a fraud upon all persons consigning their property to Paddon for sale, believing him to be the principal in, and proprietor of, the business, to permit D. M. Berry & Co. to take the proceeds of property thus consigned, and dispose of it as their own. Nine of these checks are for the price of property consigned by third persons to Paddon for sale, and sold by him pursuant to such consignments. By virtue of the contract between Paddon and these persons, the legal title to the consigned property, as against all third persons, was vested

Paddon v. Williams.

in Paddon, and the proceeds were his. As between the consignors, Paddon, D. M. Berry & Co., and all creditors of the latter firm, or of either member of it, the consignors are entitled to the proceeds of their property.

To prevent fraud upon the public, and upon any person consigning his property to Paddon for sale, the legal relations between the parties should be held to be such as Paddon and D. M. Berry & Co. have represented them to the public. If D. M. Berry & Co. have any rights, as between themselves and Paddon, which a court of equity will protect, founded upon their alleged agreed relation to each other, they should be treated as equitable rights, and enforced in a suit proceeding on equitable grounds; and looking to the protection and payment, as the primary consideration, of the creditors of Paddon. In respect of business represented to the world as his, and only his, he should be treated as having the legal title, and the legal right to redeem any property from D. M. Berry & Co., which they may forcibly, or against the will of Paddon, convert to their own use.

The evidence proffered and rejected was, "that during all this time the agreement was, between all the parties, including the plaintiff, that the *business* was to belong to D. M. Berry & Co., and that the plaintiff Paddon was to be simply a clerk. The members of the old firm of D. M. Berry & Co. were to take all the *gains* and *profits* and *proceeds* of the business, and that that understanding was in operation when Mr. Williams took the checks in question."

According to the terms of this offer, the legal title to the *corpus* of the property and effects constituting the capital and resources of the business, was not to be in D. M. Berry & Co., but in Paddon. Their right extended to the *gains* and *profits*, and only that. They would have no right, legal or equitable, to violently or fraudulently possess themselves of the *corpus*.

They might file a bill, if the case be not so infected with fraud that a court would not lend its aid, and if there could not be an amicable adjustment, for an accounting, and an application of the property of Paddon in that business to pay its debts; and then distribute the surplus.

The protection of those dealing with Paddon, and the prevention of fraud, require a court, in a case like this, to hold

Lewis v. The Broadway Bank.

that Williams has no right to claim any part of the property against the consent of Paddon, and that his only remedy is by action for equitable relief, in which the rights of persons dealing in good faith with Paddon will be protected, and the sums due them be first paid.

The judgment should be affirmed.

*Affirmed,
2 Daly 807, 42
N.Y. 463*

LEWIS *against* THE BROADWAY BANK.

New York Common Pleas; Special Term, November, 1865.

DEMURRER.—CAUSE OF ACTION.

The designation by the chamberlain of the city of New York, of the bank which is to be the depository of funds he may receive in his official capacity, does not confer any right upon the bank, and entitle it to an action for damages against another bank, which held the funds under an adverse claimant of the office of chamberlain, pending litigation as to the title to the office.

Demurrer to complaint.

The action was brought by William H. Lewis, assignee of the Broadway Bank, against the Park Bank.

The complaint claimed that the Broadway Bank, the plaintiff's assignor, was entitled to damages or interest on the funds of the city, which had been deposited by the city chamberlain with the defendants, and which the defendants held pending a mandamus, issued on the relation of Chamberlain Devlin, to obtain possession of said funds, said Devlin having designated the Broadway Bank as the depository of the moneys which he should receive in his official capacity.

The Broadway Bank assigned the claim to Lewis, the plaintiff. The case came up on defendant's demurrer.

Lewis v. The Broadway Bank.

Stillwell & Swain, and *John E. Burrill*, for the plaintiff.

Townsend & Hyatt, and *J. W. Edmonds*, for the defendants.

CARDOZO, J.—I think it is an error to suppose that the Broadway Bank, the assignor of the plaintiff, had any legal right whatever until the money had actually been deposited with it, by the chamberlain, and as that error lies at the basis of this action, the defendant is entitled to judgment on the demurrer.

An examination of the act of 1860 (ch. 477, p. 953) shows that the deposits are to be made by the "chamberlain," from time to time as received by "him." The designated Bank is to receive the deposits from the chamberlain—not from any one else. It is a mistake to term the Bank a "depository" of the money, until it has actually been deposited. The chamberlain, by virtue of his office, may have the right to demand the possession of money belonging to the city, to deposit in the Bank he designates under his official bonds; but that was *his* right, and not the Bank's, and could not confer any interest or right of action on the latter. Until money has actually been received by the chamberlain, and deposited by him, it being his duty "without delay" upon its receipt to make the deposit, it is only a question of the performance of his official duty. It may be, though I express no opinion on the point, that the city or the chamberlain might have maintained, and that perhaps it was his duty to bring, an action against the Park Bank, to recover the deposits with interest, for the benefit of the public: but until the deposits actually reached the Broadway Bank, it had no interest in them. This seems to me to be clear from another consideration. The mere designation by the chamberlain of a Bank under his official bond, pursuant to the above-mentioned statute, did not devolve any duty upon the Bank. It was not obliged to receive, and might refuse to accept the deposits. The designation, therefore, imposed no duty, and consequently gave no right. Its duty and its right commenced, when money was actually deposited with and accepted by it. Then it became a "depository."

The mandamus mentioned in the complaint was a proceeding, not upon the part or behalf of the Broadway Bank, but upon the relation of Mr. Devlin, the chamberlain; and in the absence of

Hadfield v. The Mayor, &c. of New York.

any averment showing that the supreme court decided anything more in that matter, I think the whole effect of that proceeding was to establish the right of the chamberlain to change the Bank of deposit,—and to transfer the money of which he is the legal custodian to the newly selected Bank. I do not see that any right of the Broadway Bank was passed upon in that matter.

Judgment for defendant on demurrer, with costs.

HADFIELD *against* THE MAYOR &c. OF NEW YORK.

New York Superior Court; Special Term, November, 1866.

JUDGMENTS AGAINST THE CITY OF NEW YORK.

The provision of the *Laws of 1865, 1335, ch. 646, § 4*,—that until moneys necessary for the payment of any judgment against the city of New York shall have been raised by taxation, no execution shall issue on the judgment,—does not apply to judgments on contracts made before the act took effect.

Motion to set aside execution.

The plaintiff in this action, John W. Hadfield, having recovered judgment against the corporation of the city of New York issued execution thereon, which the defendants now moved to set aside.

Mr. Dean, for the motion.

R. H. Huntley, opposed.

BARBOUR, J.—This is a motion on the part of the defendants for an order vacating and setting aside an execution issued upon the judgment in this action; and is based upon the fifth

Hadfield v. The Mayor, &c. of New York.

section of chapter 646 of the statutes of 1865, relating to taxes and expenditures for this city,—which provides that the amount of all final judgments recovered against the mayor, aldermen, &c., after the confirmation by the supervisors of the tax-levy for the year 1865, shall be included by the comptroller in his next annual report or budget, and shall be included in the tax levy for the year current; and further directs that, until the moneys to pay such judgments shall have been so raised, no execution shall issue against the mayor, &c., unless the amount of such judgment shall have been included in the next tax-levy passed by the legislature. The judgment was recovered subsequent to the passage of that act; but the contract upon which it was founded was entered into before the act was passed.

It is not necessary to consider the question whether the restriction in regard to executions and judgments above referred to, is expressed in the title of the act, or whether such act embraces more than one subject, within the meaning of the sixteenth section of the third article of the Constitution. It is sufficient to say in this case, that the intention and design of the provision of the act in question is, manifestly, to deprive the plaintiff in a judgment recovered upon a contract which was in existence and in full force when such act was passed, of his remedy upon such judgment and his rights thereunder forever, unless the legislature shall in its discretion, at some future time, by a new law, provide for its payment. The question as to the unconstitutionality of statutes of this character is now so well settled by numerous decisions in the supreme court of the United States and elsewhere, that nothing is necessary here beyond a mere statement of the case and a reference to the authorities (*Bronson v. Kenzie*, 1 *How. S. Ct.*, 315; *McCracken v. Hayward*, 2 *Id.*, 608; *Curran v. The State of Arkansas*, 15 *Id.*, 304. See also *Sedgwick on Stat. and Cons. Law*, 647 *et seq.*, and 4 *Kent's Com.*, 430).

The motion must be denied, with ten dollars costs.

HAGER *against* TIBBITS.

Supreme Court, Third District; General Term, December, 1865.

PLEADING.—ANSWER IN ACTION FOR DEFAMATION.

In an action for libel, an answer setting up that the defendant made the publication at the request and on the information of a third person, is bad on demurrer.

Such facts are not mitigating circumstances. The Code of Procedure has not changed the rules as to what circumstances are mitigating.

It seems, that an answer alleging mitigating circumstances must state that they are set up in mitigation.

Appeal from an order sustaining a demurrer, interposed by the plaintiff, to the second answer of the defendant to the plaintiff's complaint.

This action was brought by John Hager against Henry Tibbits. The complaint of the plaintiff alleged as follows:

"That the defendant, on or about the 20th day of June, A. D. 1864, contriving, and wickedly and maliciously intending to injure this plaintiff in his good name, fame, credit, and reputation, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens, and cause it to be suspected and believed by those neighbors and citizens that the said plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned to have been made and charged upon him, by the said defendant; and to vex, harass and oppress him, the said defendant did, on the said 20th day of June, aforesaid, at the county of Schoharie, aforesaid, falsely, wickedly, and maliciously compose and publish, and cause and procure to be composed and published, in a letter written by the said defendant, to one A. W. Wetherwax, a citizen of said county, of and concerning him, the said plaintiff, a false, scandalous, and defamatory and libelous

Hager v. Tibbits.

matter following of and concerning the said plaintiff, that is to say : John Hager (plaintiff meaning) of North Blenheim, is not enrolled (meaning under the act of Congress for enrolling and calling out the national forces of the United States), he (plaintiff meaning) is a secessionist (meaning that the plaintiff is a traitor and rebel against the government, constitution, and the laws of the United States), and should be enrolled (meaning under the enrollment act aforesaid). Please notify Seward Hager (meaning the enrolling officer, and deputy marshal of the town of Blenheim) of that fact (meaning the fact that the plaintiff is a secessionist).

“ And the complaint of the plaintiff further shows, that afterwards, and on or before the 12th day of July, 1864, at the city of Albany, in the State aforesaid, the defendant did falsely, wickedly and maliciously publish, and cause and procure to be published to the commissioner of the draft, and provost-marshal of the fourteenth district of New York, and divers other citizens of this State, of and concerning the plaintiff aforesaid, to harass and oppress him, the said plaintiff, a letter written by the said defendant, of, and concerning the said plaintiff, containing the said false, scandalous, malicious, and defamatory libel aforesaid. that is to say : John Hager (plaintiff meaning) of North Blenheim, is not enrolled (meaning under the act for enrolling and calling out the national forces). He (plaintiff meaning) is a secessionist (meaning that the plaintiff was a traitor and a rebel against the government, constitution and laws of the United States) and should be enrolled, (meaning under the enrollment aforesaid). Please notify Seward Hager (meaning the enrolling officer and assistant marshal of the town of Blenheim), of that fact (meaning the fact that plaintiff is a secessionist).

“ And the complaint of the plaintiff further shows, that afterwards, and on or about the 11th day of July, 1864, at the town of Blenheim in the county of Schoharie, the said defendant did falsely, wickedly, and maliciously publish, or cause and procure to be published, of and concerning the plaintiff, to divers citizens of said town, for the purpose of injuring the plaintiff in his good name, fame, credit and reputation, among the good and worthy citizens of the town of Blenheim aforesaid, and cause it to be understood and believed among the said citizens, that the plaintiff was disloyal to his government, and a traitor and rebel

Hager v. Tibbits.

against the government, constitution and laws of the United States, of which he was a citizen and subject, the following false, scandalous, malicious, defamatory and libellous letter, containing certain false, scandalous, malicious, defamatory and libellous matter. That is to say :

“MR. A. W. WETHERWAX :

“*Dear Sir*,—I am informed that John Hager, at North Blenheim, is not enrolled. He is a secessionist, and should be enrolled. Please notify Seward Hager of that fact, and oblige,

HENRY TIBBITS.

“*June 20th, 1864.*

“And the plaintiff avers the said defendant, in causing and procuring said libellous letter aforesaid to be published, falsely, wilfully, and maliciously meant and intended to charge the plaintiff with being a secessionist, traitor, and rebel against the government, constitution and laws of the United States, of which he was a citizen and subject, as aforesaid. By means of committing of which said several grievances by the said defendant, the plaintiff hath been, and still is, greatly injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens, and thereby subjected to the liability of punishment, and the pains and penalties of the crimes and offences aforesaid, to the damage of this plaintiff of five thousand dollars. Wherefore, &c.”

The answer of the defendant alleged as follows : “That the defendant denies generally each and every allegation in the plaintiff’s complaint mentioned.

“And for a further answer to this complaint, says, that if he did on or about the 20th day of June, A. D. 1864, write or publish of and concerning this plaintiff (that he was a secessionist), that he did so at the request, and on the information of one Cornelius Winney, that this plaintiff was a secessionist; and that defendant, relying on said statements, and supposing them to be true, in good faith and without malice did what he did in the premises.”

The plaintiff demurred to the second defense set forth in this answer, and for grounds of demurrer specified the following :

Hager v. Tibbits.

1st. That the same does not state facts sufficient to constitute a defense to said action.

2d. That said second defense does not admit the publication of the libel which he seeks to mitigate or excuse.

3d. That said second defense is hypothetical and conditional.

4th. That all the facts stated in said second defense do not constitute an answer to said complaint, or any legal mitigating circumstances.

The demurrer having been sustained at special term, the defendant appealed.

H. Smith, for the appellant and defendant.

Mayham & Dyer, for the plaintiff, respondent.

MILLER, J.—I think that the answer demurred to contains no defense to the plaintiff's complaint, and that it was not in mitigation of the alleged libel that the defendant made the publication at the request of and upon the information of another party. That no such rule prevailed before the Code of Procedure went into effect, there can be no doubt, and I do not understand that it is claimed that prior to the Code it was otherwise (*Maps v. Weeks*, 4 *Wend.*, 649; *Inman v. Foster*, 8 *Id.*, 602).

It is said, however, that the Code has changed the rule, and now permits such circumstances to be alleged, although they do not constitute a defense in mitigation of damages. Prior to the enactment of the Code, the decisions, notwithstanding some little diversity in other States, were substantially to this effect, that any facts and circumstances which tended to disprove malice, by showing that the defendant, though mistaken, believed the charge to be true when it was made, might be given in evidence in mitigation of damages; but if the facts and circumstances tended to establish the truth of the charge, or formed a link in a chain of evidence going to make out a justification, they were not admissible in mitigation of damages (*Cooper v. Barber*, 24 *Wend.*, 105; *Root v. King*, 7 *Cow.*, 613; *Fero v. Ruscoe*, 4 *N. Y.* [4 *Comst.*], 162; *Purple v. Horton*, 13 *Wend.*, 9; *Gilman v. Lowell*, 8 *Id.*, 573).

Under this rule, a plea of justification was conclusive evi-

Hager v. Tibbits.

dence of malice ; and a party having alleged a justification and failed to establish it, even although he showed many circumstances which tended to sustain the truth of the charge, was effectually precluded from the benefit of mitigating circumstances. The two defences would not stand together, and in assuming one of them the other was excluded. If a defendant pleaded a justification, that was the end of any mitigating circumstances.

If he relied upon the mitigating circumstances, then of course his justification must fall. In pleading the latter, he was in danger of having the damages greatly enhanced by being concluded from the benefit of any evidence tending to disprove malice.

To remedy this apparent injustice, the Code (§ 165) enacted that the defendant might, in his answer, allege both the truth of the matter charged as defamatory, and mitigating circumstances to reduce the amount of damages, and even although he failed to prove the justification, he might give in evidence the mitigating circumstances.

The effect of this simply was, to give the defendant the benefit of both those defences, and not confine him to one alone, as was the rule before the Code.

I think it did not alter the rule as to what constituted mitigating circumstances, or in any way add to the strength of any such defence, by authorizing facts to be considered as mitigating the charge, which previously, and by well-settled rules of law, were not thus regarded.

The provision of the Code contains no such principle, nor do the authorities which have given this section a consideration authorize any such interpretation.

The case of *Bush v. Prosser* (11 *N. Y.* [1 *Kern.*], 347), is relied upon as sanctioning the doctrine that the facts contained in the defendant's answer were to be considered under the section cited as mitigating circumstances. I do not thus read that decision, and it seems to me that it will not bear any such construction. No such defence was presented in that case as arises here, and the proofs rejected and excluded, on account of which the judgment was reversed, were facts, and not information alone. The decision of the judges in that case does not hold that the Code has changed the law ; and, as I understand,

Hager v. Tibbits.

SELDEN, J., intended to decide that a belief based on information derived from others could not be shown, as the law now is. I discover no case in the books which holds that a party can shelter himself against the consequences of an alleged slander, by proof that he had information from another as to the fact.

In principle, it never has been held a mitigation; and the enactment of the Code that *both* a justification and mitigating circumstances may be introduced, cannot change the principle. But why should any such information mitigate the slander? Is it less injurious or offensive on that account? Does it, for that reason, inflict less of a stain upon the character and reputation of the person thus unlawfully assailed? Certainly not. Nor can it be any real valid or lawful excuse to a party circulating a slanderous and defamatory charge, that he had information to that effect. The reputation of an individual is sacred; and no person should assume to propagate and set afloat a charge which impugns it, on information derived from another, without first making an inquiry, and investigating its truthfulness. Where he does so, I think he assumes the responsibility of the truth of the charge thus made, and it is no mitigation that he obtained information from another party which he believes to be true.

I also think there is another reason why the answer is demurrable. The answer does not state that the facts alleged are set up as a mitigation. This should have been done to entitle the defendant to the benefit of it in that particular.

Where circumstances, which can only be given in evidence in mitigation of damages, are set forth in the answer, it must be distinctly stated that it is with that view, and for that purpose only, that they are introduced, as otherwise the plaintiff will have a right to infer that they are relied on as a bar to the action, and upon that ground may properly demur (*Fry v. Bennett*, 1 *Code Rep.*, N. S., 238; 5 *Sand.*, 54; *Matthews v. Beach*, 5 *Sand.*, 264; *Ayres v. Covill*, 18 *Barb.*, 260).

I am also of the opinion that the complaint of the plaintiff is not defective. I do not deem it necessary to discuss the question whether the term "secessionist" is actionable *per se*, as I think the complaint can be sustained without maintaining any such proposition.

The alleged libel points the charge with great distinctness

Hager v. Tibbits.

stating that the plaintiff was not enrolled, and giving a reason why he should be, not found in the enrollment act, and not authorized or sanctioned by any law of the land. The law provides for the enrollment of persons liable to military service; but it no where enacts that a person shall be made liable because he is a secessionist. Why then should his being a secessionist be a reason for enrolling the plaintiff? The character of a person entertaining such views was such as to call home upon him the vengeance of the government, and the opposition of good and loyal citizens. It is not to be disguised that it was an offensive and opprobrious epithet, which, at a time when the country was engaged in a civil war which required all its energies to suppress and subdue, was calculated to bring the party to whom it was applied into public disgrace, ridicule, and contempt, with his neighbors and friends. It was so regarded by the defendant, and in inditing and sending the communication which is alleged to be libellous he proposed to have the plaintiff punished for that reason. Even although it may not have charged the plaintiff with a crime against the law, it was clearly libellous, and actionable as a malicious publication which reflected upon the character of the plaintiff without justification or excuse (See *Brown's Legal Maxims*, 233, 234; 2 *Kent's Com.*, 13; *The People v. Cornell*, 3 *Johns. Cas.*, 354; *Steel v. Southwick*, 9 *Johns.*, 215).

For the reasons given, the order of the special term should be affirmed, with costs of appeal.

HOGEBOM, J., dissented.

PECKHAM, J.—I concur on both grounds.

I. Defendant does not affirmatively set up any circumstance in mitigation of writing or publishing. In his second defense he obviously evades saying that he either wrote or published. But he "did what he did" for the reason stated.

II. The Code, I think, does not assume to define what is a mitigating circumstance. This court has held the matters here assumed to be set up to be no mitigation. So in *Bush v. Prosser* (16 *N. Y.*, 361), Mr. Justice SELDEN says, "It has been long settled in this State, and in Massachusetts, &c., that no mere report, not amounting to proof of general charac-

Adams v. Bush. (No. 1.)

ter, nor information obtained by the defendant from others as to the truth of the charge, unless accompanied by proof that such information is true, can be received for the purpose of rebutting the presumption of malice." He says "the evidence has been rejected, for, as it appears to me, the soundest reasons." I think he is right.

ADAMS *against* BUSH.

[No. 1.]

Court of Appeals ; July Term, 1863.

APPEAL TO THE COURT OF APPEALS.—NEW TRIAL.—NEWLY
DISCOVERED EVIDENCE.—CUMULATIVE EVIDENCE.—
AFFIDAVITS TO MOVE FOR NEW TRIAL.

Although the amendment made in 1862 to the second subdivision of section 11 of the Code of Procedure,—so as to authorize appeals to the court of appeals from orders refusing new trials, as well as from orders granting them,—does not effect a change of the principle limiting the examination of the verdict of a jury to the court in which it was rendered, and does not authorize an appeal, where there are no exceptions, and no questions of law, and the only point is whether the verdict is not against or without evidence;—yet the court of appeals, under that amendment, may entertain jurisdiction of an appeal from an order denying a motion for a new trial, made upon the ground of newly discovered evidence. *Per* DENIO, Ch. J.

To support a motion for a new trial upon the ground of newly discovered evidence, the moving papers should contain an affidavit of the witnesses who, it is claimed, will give the additional evidence relied on, stating that they are ready to swear to the facts claimed to be newly discovered.

The rules applicable to the question of what newly discovered evidence is ground for granting a new trial, stated and applied. *Per* DENIO, Ch. J.

Appeal from an order denying a new trial.

This action was brought by Henry C. Adams against Peter G. Bush and Jacob G. Bush, survivors of Peter G. Garlock, de-

ceased, to recover for services alleged to have been rendered by the plaintiff, upon the retainer of defendants and Garlock, as their attorney and counsel.

Upon a trial before a referee, one of the defendants testified that a large part of the services of plaintiff were rendered under a special agreement, conditioned on success in the cause in which plaintiff was retained; and the referee disallowed the plaintiff's claim as to these services.

After the referee had reported, the plaintiff moved for a new trial, on the ground of newly discovered evidence. The moving affidavit was made by the plaintiff; and in it, after stating the evidence given on the trial, alleged that he was surprised by the testimony of the defendant; and that, as he then knew of no witness or evidence by which he could disprove it, except his own testimony, he gave his own testimony, and then submitted the cause to the referee; that the sureties in an undertaking given in the cause in which he had rendered the services in question, and whom he now desired to produce as witnesses on the new trial he asked for, resided at some distance from the place of trial, and, on subsequently meeting them, he learned that they could disprove the alleged agreement. The plaintiff's affidavit then proceeded to state what each of these witnesses could testify to.

The motion was denied at special term, and the denial affirmed at general term, upon the ground that the evidence which the plaintiff had discovered was cumulative.* From that decision the plaintiff now appealed to the court of appeals.

Henry C. Adams, appellant in person;—Cited *Glidden v. Dunlap*, 28 *Me.* (15 *Shep.*), 379; *Kirby v. Waterford*, 14 *Verm.*, 414; *Waller v. Graves*, 20 *Conn.*, 305; *People v. Superior Court of New York*, 10 *Wend.*, 285, 293; *Steinback v. The Columbia Ins. Co.*, 2 *Cai.*, 129; *Aiken v. Bemis*, 3 *Woodb. & M.*, 348; *Burr v. Palmer*, 23 *Verm.* (8 *Washb.*) 244; *Barker v. French*, 18 *Verm.* (3 *Washb.*) 460; *Watts v. Howard*, 7 *Met.*, 478; *Vardeman v. Byrne*, 7 *How. Miss.*, 365; *Den v. Wentermouth*, 1 *Green*, 177; *Barstow v. Reynolds*, 37 *Eng. L. & Eq.*, 468; *Seeley v. Chittenden*, 4 *How. Pr.*, 265; *Guyot v. Butts*, 4

* The decision in the supreme court, with the argument upon an unsuccessful motion for a rehearing, is reported in 23 *How. Pr.*, 262.

Adams v. Bush. (No. 1.)

Wend., 579; *Simmons v. Fay*, 1 *E. D. Smith*, 107; *Platt v. Monroe*, 34 *Barb.*, 291; *Listen v. Mundell*, 1 *Bos. & P.*, 427; *Sargent v. —*, 5 *Cow.*, 106, 123.

J. Genter, for the respondents;—Cited *Grah. Pr.*, 630; *Grah. on New Tr.*, 463, 506; *Smith v. Brush*, 8 *Johns.*, 84; *Pike v. Evans*, 15 *Id.*, 210; *Steinback v. Columbia Ins. Co.*, 2 *Cai.*, 129; *People v. Superior Court of New York*, 6 *Wend.*, 114, and 10 *Id.*, 285; *Chatfield v. Lathrop*, 6 *Pick.*, 417; *Price v. Brown*, 1 *Strange*, 691.

DENIO, CH. J.—The legislature, by an act passed April 23, 1862 (*Laws of 1862*, 846, ch. 460, § 1), amended the second subdivision of the eleventh section of the Code of Procedure, so as to authorize appeals to this court from orders of the court of original jurisdiction *refusing* a new trial, having before amended it, so as to permit an appeal when a new trial had been ordered. It is rather difficult to determine to what class of cases the amendment last made applies. When questions of law have been raised by exception, and a new trial is denied, those questions were always brought here on appeal from the judgment, and no amendment of the Code was necessary for such cases. When the trial was by jury, it has not been considered expedient that the questions of fact arising upon the evidence should be subject to review in the court of appeals. Such questions are to be heard in the first instance before the judge who tried the cause, on his minutes, or at a special term, on a case, and there is then an appeal to the general term (*Code*, §§ 265, 349). The litigation of the facts arising upon jury trials was to end there. This is apparent, as well from the nature of the case, the former practice, and general principles of convenience and propriety, as from sundry other provisions of the Code. For instance, where a verdict was taken, subject to the opinion of the court at the general term, which could only be done where the trial presented questions of law alone, the legislature was careful further to provide that a review in this court could only be had, when questions of law were involved in the rendition of the judgment (§ 265). The determination of a single judge, where the trial was without a jury, or the decision of referees upon questions of fact were considered less authori-

tative than the verdict of a jury, and yet, in the arrangements for appeals in such cases, it was carefully provided that the review of the facts should be limited to the general term of the court in which the action was brought, while the questions of law might be heard in this court (*Code*, §§ 368, 272, 248). In 1860 amendments were made respecting the review of cases tried by the court without a jury, and by referees, to the effect that where a judgment in that class of cases should be reversed by the general term, the judgment might state that such reversal was upon questions of fact, and when so stated, the propriety of the reversal—either upon matters of fact or of law should be examinable in this court (ch. 459, §§ 9, 10). The limitation of this amendment to cases other than jury trials showed a persistent determination of the legislature that we should not possess a jurisdiction to review verdicts of juries. It was upon the views here presented, that when the amendment of 1862 came first before us, at the last January term, in the case of *Pierpont v. Barnard*, we decided that it did not effect a change of the principle which limited the examination of the verdict of a jury to the courts in which it was rendered. In that case the jury had returned a verdict for the defendant, and the general term, on appeal from the special term, had *denied* a new trial, and the plaintiff appealed to this court from that order. It was conceded by the appellant's counsel that there were no exceptions in the case on which he could rely, or any questions of law ruled by the judge, and the only point was whether the verdict was not against or without evidence. The court held that there was nothing which could be reviewed under this amendment, and dismissed the appeal.

The present appeal presents a different question. A new trial has been denied, and the appeal from that determination does not involve an examination of a verdict. It is true that the application to open a case on the ground that the party has been surprised, or has discovered new evidence, is usually addressed to the discretion of the court; and convenience as well as analogy would seem to require that it should be determined exclusively by the court of original jurisdiction. It is very much of the same character as a default or other laches suffered by mistake or surprise, which may be relieved against in proper cases by the court in which the action is pending; but it has not

Adams v. Bush. (No. 1.)

hitherto been supposed that the disposition of such matters were reviewable by an appellate court. We must however intend that something was meant to be effected by the amendment of 1862; and as this appeal is within the language, and taking cognizance of it would not be hostile to any other provision of the Code, or to any settled purpose of the legislature, we have come to the conclusion that we possess jurisdiction to hear and determine the question involved in it.

The defendants in the present action prevailed before the referee, in their defense to the plaintiff's claim for compensation as attorney and counsel of the defendants in prosecuting an appeal in their action against Fox and Brookman from the circuit to a general term, that defense being that the plaintiff had agreed to render his services gratuitously, and to require only payment for his traveling expenses to the supreme court. All the parties were examined as witnesses. Both defendants swore to such an agreement, and the plaintiff denied it. In their testimony the defendants stated that the agreement was made at the plaintiff's office, at Fort Plain, on the occasion of signing the undertaking for the appeal to the general term, and one of them, Jacob G. Bush, swore that Mr. Davis, who was a surety in that undertaking, was present, and made a remark touching the inexpensiveness of the proceeding since the plaintiff was not to charge any thing for his services. The defendants stated that they were reluctant to bring the appeal, and consented to do so in consequence of the plaintiff's agreement. In the plaintiff's testimony, after denying the alleged agreement respecting the appeal to the general term, he stated that after the case had been decided against his clients, the present defendants, at such general term, he, the plaintiff, proposed that they should take an appeal to the court of appeals, and offered, in case they would do so, that he would charge them nothing but disbursements in case they did not succeed. An undertaking, he said, was drawn for the last mentioned appeal, and it was signed by Davis as a surety, but it was abandoned, the defendants being ultimately unwilling to go on. The question upon this evidence—and it is all which was given touching the alleged agreement—was, of course, whether the defendants had not mistaken the conversation respecting the proposed second appeal (*i. e.*, to the court of appeals), for

an agreement touching the appeal to the general term, which was actually brought. The referee found against this hypothesis ; but the plaintiff now swears to certain evidence which he has since discovered, and which he maintains will demonstrate that the defendants swore untruly, or at least mistakenly, and that his testimony furnished the true account of the matter. The undertaking for the appeal to the general term appears to date about the 22nd April, 1859, and to have been signed by the present defendants and by Peter G. Garlock as principals, and by Alfred B. Davis and Daniel Hufnail as sureties. The plaintiff, in his affidavit in support of the motion, swears that Davis has informed him, in substance, that the fact is, and that he is ready to swear, that he executed the undertaking upon the appeal to the general term at about the time mentioned, at the office of the plaintiff ; that said plaintiff was not present ; that Henry Adams Esq., the plaintiff's father, was present on that occasion and superintended the execution of the paper by said Davis, and that he never heard any conversation respecting the plaintiff's compensation for services respecting that appeal, but that in June, 1860, he was at the plaintiff's office to execute an undertaking for an appeal, in the same case, from the general term to the court of appeals, and that said plaintiff there stated to the defendants, who were reluctant to bring that appeal, that if they would do so, and should fail of success in the court of appeals, he would not charge them any thing except his traveling expenses, and some small items of expense which said Davis cannot recollect, and that he never heard the plaintiff say any thing about compensation at any other time.

The plaintiff's affidavit also states that Hufnail will swear that he signed the said first undertaking as surety the 22nd April, 1859, and that no one was present except Peter G. Garlock and the plaintiff, and that no conversation took place upon the subject of the plaintiff's compensation. The plaintiff excuses to a certain extent his want of preparation to meet the testimony of the defendants on the trial by saying that that part of the case was gone through with in haste, on account of the impatience of the referee, who was anxious to close the case and return home, after an absence of several days, which had been consumed on the trial, and that he did not

then recollect the facts of refutation which he has now the power to make use of, and he excuses the delay in applying for the new trial, by the proceedings before the referee, to induce him to open the case.

There seems to me so strong a probability that the testimony of those persons would clear up the difficulty, and reconcile the discrepancy in the testimony of the parties, that an opportunity ought to be afforded for hearing their evidence, unless the granting the application would violate some settled practice of the court. It has been often held that a new trial would not be granted on account of newly discovered evidence, where it was merely cumulative. In one sense, evidence to establish the same general proposition is cumulative, but this is not what is meant by the term as used in the cases. All evidence in a cause, to be competent, must bear upon the issue. If there had been an acknowledged interview between the parties at the time the undertaking was signed, and evidence had been given *pro et contra* as to the alleged agreement having been then made, the testimony of additional witnesses would have been cumulative, and a new trial would not have been granted to enable their evidence to be given. The proof alleged to have been discovered in this case, is not all of that character. If the plaintiff was not present when the first undertaking was signed, he could not have made the agreement on that occasion. Both the Bushes swore that it was made at that time. It is possible that there may have been more than two occasions of signing. Davis signed it at one time, and then the plaintiff was not there. Hufnail signed it at a different time, but the Bushes were not present. It is not said when the principal parties executed it, but as J. G. Bush swears that Davis was present at the time of the agreement, it must have been at the time of the execution of the paper by him. The plaintiff is corroborated by Davis as to the conversation when the undertaking was signed in 1860. This conversation was not directly opposed to the evidence of the agreement said to have been made the year before, but it shows considerable probability that the defendant's were under a mistake. This corroboration, however, would not be sufficient to warrant a re-trial of the case. But the testimony of Davis, if such as the plaintiff's affidavit suggests, would be to

a new point, namely, the absence of the plaintiff on the occasion when he is supposed to have made the agreement. That had not been stated by any witness actually examined. It is in the nature of an *alibi*, and resembles a case where one should be convicted of an act, and should afterwards be able to show that when the supposed act was done he was in another place. The cases admit that such evidence would not be cumulative (*Sargent v. —*, 5 *Cow.*, 160; *The People v. The Superior Court of New York*, 10 *Wend.*, 285).

After all, a new trial should not be granted for such a cause without pretty strong grounds for suspecting that justice has not been done, and that a rehearing of the matter in the light of the new evidence will change the result.

I think the more just exercise of the discretion of the supreme court, would have been to order the plaintiff to try the cause again, for the purpose of further testing the question; and since that decision seems to be cast on us, we must so determine. But this should be done only upon terms.

As the plaintiff recovered a considerable amount on the trial, he ought not to be compelled to pay the costs then incurred. As it is to be presumed that he will receive at least the same amount again, he might compel the defendants to pay the costs of the second trial, though he should fail upon the portion of his demand involved in his appeal. He must therefore stipulate not to tax costs against the defendants for the further proceedings in this case, but that he will pay costs to the defendants, if he should fail to recover for his services in the appeal to the general term in the case of *Bush* and others against *Fox* and another, mentioned in the answer in this action, provided the defendants shall agree to submit to a report against themselves to the amount before reported.

The costs of this appeal are to abide the same result, namely, whether the plaintiff shall ultimately recover for these disputed services.

The other judges, however, were all of the opinion the plaintiff's papers in support of the motion were defective in not containing an affidavit of the witnesses who, it was claimed, would give the additional evidence relied on, stating that they were ready to swear to the facts claimed to be newly discovered.

Adams v. Bush. (No. 2.)

They therefore decided to affirm the order appealed from, upon that ground, though it had not been suggested by the respondents' counsel, without passing upon any other point; and DENIO, Ch. J., was understood to concur in that determination.

ADAMS *against* BUSH.

[No. 2.]

Supreme Court, Fourth District; Special Term, August, 1863.

MOTIONS AND ORDERS.—LEAVE TO RENEW.—UNPAID COSTS.—
FORMER ADJUDICATION.

After a motion has been denied, upon the ground that material facts, stated in the moving papers, ought to have been substantiated by the oath of the witnesses, instead of merely by that of the attorney or party, it is proper to grant an application for leave to renew the motion, especially where the objection was not interposed by counsel, but was raised by the court, of its own motion.*

The court will not refuse leave to renew a motion merely because the costs of the former application remain unpaid, unless it appears that the party seeks to avoid payment, or is insolvent, or has no property within the jurisdiction of the court, from which payment may be obtained by the usual process.

A decision of the supreme court of the general term should not be reconsidered by a single judge sitting at a special term, though on an intermediate appeal to the court of appeals a member of that court may have expressed an adverse opinion to that of the supreme court.

Motion for renewal of a motion for a new trial, previously denied.

The plaintiff having recovered, on a trial before a referee, only part of his claim, moved for a new trial, on the ground of surprise and newly discovered evidence. The motion was denied; and on appeal to the court of appeals, the order was

* Compare Livingston's Petition, *Ante*, 1.

affirmed, on the ground of a defect in the moving papers, the only judge who expressed an opinion on the merits of the case, holding however, that on the merits, the moving party would have been entitled to a reversal of the order. The facts are fully stated in our report of that decision, *supra*, 104.

The plaintiff procured the necessary affidavits to supply the defects in the moving papers, and now applied to renew his motion.

Henry C. Adams, plaintiff in person, for the motion.—I. The plaintiff has adopted the correct partice by asking leave to renew his motion, he having lost his former motion upon a supposed defect in his papers (*Mitchell v. Allen*, 12 *Wend.*, 296; *Dolfus v. Frosch*, 5 *Hill*, 493; see note, 494; *Bellinger v. Martindale*, 8 *How. Pr.*, 113). The fact that such leave was granted should be stated in the order (5 *Hill*, 493).

II. The plaintiff has fairly explained the difficulties and uncertainty in the practice in such cases; his inability to obtain the affidavit of Davis, the principal witness; the undisputed influence brought to bear by the defendants against his making an affidavit; that the judge, at the special term (in November, 1861), told both attorneys that, when there was no dispute about the facts, such affidavits were unnecessary; that plaintiff requested the motion should be held open, or else denied without prejudice, in case objection should be taken to the sufficiency of plaintiff's papers, or the correctness of his practice, and that no objection of that nature was taken on the motion; that plaintiff lost his case, in the court of appeals, solely upon a supposed technical defect, not before suggested; the fact too that the motion was not heard, but was submitted to Judge JAMES upon the papers, besides other important facts appearing in the case—especially the fact that upon the examination of said Davis, before the referee, on the 31st of July, 1863, said Davis disclosed the fact that Jacob G. Bush was not present at the execution by Davis of the first undertaking, April 23, 1859, which fact this deponent never knew until it was so disclosed by said Davis, and the same is a newly discovered fact, first made known to deponent through such examination, and was not previously known to this deponent to exist;—all show that it is just to allow

the motion to be renewed. The law of estoppel does not embrace summary applications, addressed to the discretionary jurisdiction of the court, especially where new facts are developed, or where there was ignorance of the practice, or surprise, etc. Such is the plain determination of the cases (*Simson v. Hart*, 14 *Johns.*, 63; see *SPENCER, J.*, 77; *Dolfus v. Froesch*, 5 *Hill*, 493, and see note, 494; see also *Ph. Ev.*, Edwards' ed., note 262, on 20; note 292, on 114, 115). In *Mitchell v. Allen*, 12 *Wend.*, 290, *SUTHERLAND, J.*, says, "Such motions are always granted if," &c.

III. The motion for a new trial should be granted for many reasons, and particularly, (1.) Upon grounds and authorities stated in my printed points in the court of appeals. (2.) For reasons and upon principles stated in the opinion given in the court of appeals, *per DENIO, Ch. J.* That opinion is unanswerable in its arguments, and pre-eminently just in its terms and principles; and—especially as there was no dissenting voice against it—will strike the professional mind of the land as a complete authority, and as a perfect overthrow of the groundless opinion of *ROSEKRANS, J.*, to the contrary, at the general term, which latter opinion received no countenance in the court of appeals.

It purports to be founded upon 10 *Wend.*, 285; when, upon the face of it, that case is direct authority against that opinion; and so it is treated *per DENIO, Ch. J.*, from whose opinion no voice dissented, *not even Mr. Justice ROSEKRANS himself.*

The conclusion in the court of appeals states, "the other judges, however," &c., from which it is fairly to be inferred the court were finally unanimous in the views of the *Ch. J.*, and that, upon the merits, the order of the general term should have been reversed for the reasons, and upon the terms there stated; but as the plaintiff's papers were supposed to contain a technical defect not before complained of or suggested, "they therefore decided to affirm the order upon that ground."

Giving the words "however" and "therefore" their full and fair signification, and no professional mind, governed by a sense of equity and justice, can doubt, in view of the whole case, that plaintiff should have his motion, at least upon the terms indicated in the opinion *per DENIO, Ch. J.*

Why the court of appeals should reach so far for an unsuggested and uncomplained-of cause to affirm a decision which, upon the merits, is conceded in the opinion given in that court, to be erroneous and unjust, is past my comprehension. *The parties were not heard upon any such question.* The only case where it was ever held to be necessary to produce the affidavit of the witness was in the superior court of New York, where it was made a distinct ground of *preliminary objection* (Denn v. Morrill, 1 *Hall*, 382), while here no such objection was taken by counsel at any stage of the case.

The decision, however, has been made, and the plaintiff's only course to obtain his rights, is to go back and meet the supposed difficulty, which he now does to the fullest extent, by producing the affidavits of the witnesses.

J. Genter, opposed.—I. Defendants insist that by the remittitur and the judgment of the court of appeals, the plaintiff is estopped in this motion. The general term order is affirmed, it is not reversed; and it must be affirmed in that court (2 *Paige*, 45).

II. The plaintiff has been too negligent to be entitled to move now; and his ignorance of the law will not excuse him (10 *Wend.*, 285; 2 *Caines*, 182; 18 *Johns.*, 489; 10 *How.*, 261; 7 *Barb.*, 270).

BOCKES, J.—This is a motion for leave to renew a former motion for a new trial, on the ground of newly-discovered evidence, and that such motion be now granted.

The former motion was made at special term, and denied. Thereupon an appeal was taken to the general term, where the order was affirmed, and this latter order was affirmed on appeal in the court of appeals.

The motion was denied at the special term, and also at the general term of this court, on the ground that the newly-discovered evidence was merely cumulative.

In the court of appeals an affirmance of the order was granted, on the ground that *there was no affidavit by the witnesses*, who, it was claimed, would give the additional evidence relied on, stating that they were ready to swear to the facts constituting

the newly-discovered evidence. The affidavits of those witnesses are now produced.

I. The first question here to be considered is, whether leave to renew the motion should be granted. I am persuaded that the court should not permit a mere technicality to preclude the hearing of this motion on the merits. The ground of the decision in the court of appeals was not suggested by counsel in that court, nor was it urged in the court below. The motion was allowed by counsel to stand on the question whether the evidence alleged to have been newly-discovered, was or was not cumulative; and the decisions in the supreme court were made on consideration of that question only. Had the objection taken by the court of appeals been urged originally at special term, undoubtedly the court would have denied the motion without prejudice to its renewal, or have allowed the motion to be renewed on application for that purpose. This point having been sprung upon the party on the last decision, without suggestion by counsel even, I think he should be allowed to stand in the same position as if it had been urged against him successfully at special term in the first instance. The case, however, stands now on a different state of facts from those presented on the former motion, or rather on a fuller statement of facts. The defect which controlled the ultimate decision on the former motion is now cured, and in this view it may be considered a new and original motion. At all events, I am satisfied that it would not accord with a just sense of propriety, or be deemed a fair exercise of discretion, to refuse to the party a hearing of the motion on the merits, as regards this objection, as the case is presented here on the papers.

II. It is urged against a renewal of this motion that the costs of the former motion remain unpaid. This objection is addressed to the discretion of the court, and will generally prevail when it is made to appear that the party seeks to avoid payment—or is insolvent—or has no property within the jurisdiction of the court, from which payment may be obtained through the ordinary appliances of the law. But neither of these difficulties are here suggested. This objection to the renewal of the motion, therefore, should not be allowed.

III. It is insisted by the counsel who opposes the motion—and this was urged on the former motion—that the alleged

newly-discovered evidence is merely cumulative. If this be so, the motion should be denied on the merits, for it is the unquestioned rule of law, that a new trial will not be granted on the ground of newly-discovered evidence, when such evidence is merely cumulative. No citation of authorities is necessary in support of this proposition. It is urged by the opposing counsel that it has been decided in this case, and on substantially the same facts, that the evidence set forth as newly-discovered was merely cumulative, and that such decision has not been reversed, overruled or shaken by any subsequent decision. If this be so, I am concluded here, at special term, by such adjudication, and am not at liberty to hold otherwise. If on examination of the facts I should arrive at the conclusion that the decision was erroneous, it must stand as the law of the case until reversed. It is true, as I believe, that the court both at special and general term adjudicated that the evidence was cumulative. This stands as a settled fact on the papers. Has this decision been reversed? The order of the supreme court was affirmed in the court of appeals.

Without going behind the order of the latter court, it would be presumed that the decision of the supreme court was right on the questions discussed and decided by it. But it is made to appear before me that the judgment of affirmance in the court of appeals was based on a defect in the moving papers, and that the court did not pass on the question whether or not the evidence was cumulative. It is made to appear before me that the court decided to affirm the order appealed from, upon the ground that "the plaintiff's papers in support of the motion did not contain the affidavit of the witnesses, who, it was claimed, would give the additional evidence relied on, stating that they were ready to swear to the facts claimed to be newly-discovered, *without passing upon any other point.*" As to this the court were unanimous, and no other question was decided (*See opinion of Judge DENIO, with Reporter's statement, supra*, 111). This opinion and certificate was read on the motion. The fact appears, that the question whether or not the evidence was cumulative, was not passed upon by the court of appeals. This being so, there has been no reversal of the decision of this court, declaring that the alleged newly-discovered evidence was cumulative. As above stated, it appears distinctly that this question

Adams v. Bush. (No. 3.)

was not determined by the court of appeals, although it was discussed by the judges on consultation, and by Judge DENIO in a written opinion, in which he arrives at the conclusion that the evidence was not cumulative.

It is said that this motion stands on other facts than did the former, besides those introduced to meet and cover the defects held to be fatal by the court of appeals. But on examination it will be readily perceived that the new facts are of the same character and belong to the same class with those formerly relied on; hence, the case is not relieved from the binding force of the former decision declared by this court at general term, which, as we have seen, has not been overruled or reversed.

It will not do for me, at special term, to override the adjudication of this court made at general term. Whatever might be my convictions of its correctness, I owe the decision respect and obedience. I must adhere to it as already pronounced until overruled or reversed by the court of appeals, or by this court at general term, on a reconsideration of the question.

The motion must be denied.

ADAMS *against* BUSH.

[No. 3.]

Supreme Court, Fourth District; General Term, May, 1865.

AMENDMENT OF CASE.

After an appeal has been taken to the court of appeals, and a case made and returned to the clerk of the appellate court, the court below will not entertain a motion to correct the case. The cause must be sent back for the purpose to enable them to do so.

Motion to correct a case made for the purpose of an appeal.

After the decisions in this cause immediately hereinabove reported, the plaintiff appealed to the court at general term

from the order made by Mr. Justice BOKES, by which his renewed motion for a new trial was denied; and at the general term the court directed the appeal to be dismissed. No written opinion was delivered at the time of the dismissal of the appeal; and upon inquiry of the judges as to the grounds of their decision, a controversy arose between the parties to the cause, as to whether it was dismissed on the ground that the order was not appealable, or on the ground that the papers were not all before the court. The defendant's counsel insisted that it was because of the omission from the appeal papers of the printed case used before the court of appeals on the former appeal, the *remittitur* from that court, and the opinion of the chief judge of that court. The plaintiff insisted that there had been no such omission; and moreover that no objection was taken to moving the appeal on this ground; or that if any was taken it was done by communication to the court in his absence.

When, therefore, the plaintiff made up a "case" for an appeal to the court of appeals from the order dismissing the appeal, and included in it the papers above mentioned, the defendant's attorney moved the court, at general term, to strike out these papers.

J. Genter, for the motion.

Henry C. Adams, plaintiff in person, opposed.—I. It was the duty of one party as much as the other to bring the papers before the appellate court (*Code of 1863*, § 328). Those papers are "a certified copy of the order appealed from, and the papers" (*i. e.*, the original papers used at special term). But if they were not before the appellate court, then the court had no power to act in the case at all, under counsel's objection against *moving it*, and the court should have sent the case over the term. The court had no right to receive the papers, if Mr. Genter's objection to moving the case was well founded; and, after receiving those papers, and finding that objection well taken, the court should have there *stopped*. The court had no right to hold the case, and dismiss the appeal under Mr. Genter's objection to plaintiff's *moving the case*, which was secretly handed up. A dismissal of the appeal was not asked or called for by that paper, nor otherwise.

II. There is no such thing as dismissing an appeal in such a case, for defects in the papers, nor for any cause. The reason for this is that this was a *non-enumerated* motion, heard at special term (*Rule 40*), and there is no rule providing for the dismissal of appeals in that class of cases. The only rules providing for the dismissal of appeals, are rules 42 and 43, and they apply exclusively to *enumerated* motions, and a dismissal can be had only on a regular application therefor, upon notice, and upon proper cause shown.

III. As to the appeal having been dismissed on the ground of defect of papers, this is an eleventh hour device to break the plaintiff down in his case. There was no such ground taken by the court. POTTER, P. J., says, upon the heels of the term, upon his recollection, then undoubtedly fresh, that the appeal was dismissed upon the ground that "it was regarded as *not* an appealable order," and thinks "Justice BOCKES' views were adopted, and that the opinion was *unanimous*,"—and the papers upon which the court arrived at that conclusion are now returned to the court of appeals, and this court has no right to strike out a line of the papers upon which they acted on that appeal, upon this pretence of "defect of papers."

BY THE COURT.—The defendants should have made their motion to correct the case, in the court of appeals, as the cause is now in that court upon the appeal; and no action which may be taken by this court can be of any service to the defendants unless the case is sent back for the consideration of this court.*

Motion denied.

* In the court of appeals the respondent moved at the June term, 1865, to dismiss the appeal: 1st. Upon the ground that the order appealed from is not appealable. 2nd. If the said order shall be deemed appealable, then, that this court send the case back to the supreme court to correct the files of their court, and the errors complained of by defendants in this motion, by striking out of the case the papers and matters, which it was alleged were not before the general term, that were before the special term, held by Mr. Justice BOCKES.

The court held the order not appealable; ruling that they could not go behind the statement of one of the members of the court below, which was read by the respondent, that the order of dismissal was by reason of defect of papers.

Accordingly, the appeal to the court of appeals was dismissed.

RUTHVEN *against* PATTEN.*New York Superior Court; General Term, December, 1863.*

SURROGATE'S COURT.—ACCOUNTING OF EXECUTORS AND ADMINISTRATORS.—ACTION ON BOND.

The surrogate has not power, without an account rendered or any inquiry into the assets and various debts of an estate, to decree the absolute payment, by the personal representative, of a debt not resting in judgment, and which is contested by him.

He cannot, upon a creditor's application for payment, and without any such accounting, try the merits of a disputed claim, and decree payment. And although the personal representative has once admitted the demand his litigating it upon such application takes away the surrogate's jurisdiction.

In an action upon an administrator's bond, by a creditor to whom it has been assigned by the surrogate to enable him to bring such action, to recover the amount of the surrogate's decree for the payment, by the administrator, of the plaintiff's demand, if it appear that the supreme court, on an appeal from the surrogate's court, have made an order or judgment in terms reversing the decree in question, this court will not inquire whether the appeal was such as to bring the decree up for review, or whether the reversal was not inadvertent. Redress against any error in the proceedings of the supreme court in this respect, must be sought in that court.

Appeal by the defendants Joseph H. Patten, James W. Wilson, and Samuel W. Bridgham, from a judgment entered in favor of James A. Ruthven and John B. Jervis, who were the plaintiffs, suing as executors, &c., of James Ruthven, deceased.

The claim out of which the judgment appealed from in this case arose, was originally against John G. Bailey, deceased, of whom the defendant Patten was administrator, in favor of the testator of the plaintiff (James Ruthven) for two quarters' rent, ending respectively in May and August, 1847. Bailey died in Brooklyn, in April, 1847, and Patten was appointed his administrator in June, 1847, by the surrogate of Kings county. In February, 1853, the testator of the plaintiff presented to the defendant Patten his claim in writing, stating its nature and

Ruthven v. Patten.

amount, duly verified by his affidavit as to its justice and the non-existence of any payments or offsets. On such claim, so verified, the defendant Patten then signed an endorsement in writing, *admitting it to be due by the estate of Bailey, and that a dividend would be paid on it, as soon as various claims should be settled and discharged.* The testator Ruthven died in November, 1855, leaving a will, by which the plaintiffs were made executors thereof.

In September, 1857, the plaintiff Ruthven, as executor, made a written application to the surrogate of Kings county, for an order requiring the defendant Patten, both to render his account as administrator, or show cause why an attachment should not be issued against him, and that such other proceedings might be had as might be requisite *to enforce the payment of the claim of the applicant.* Such application was verified, and set forth the indebtedness of Bailey, the grant of letters of administration to the defendant Patten, the filing by him of an inventory, and the non-payment of such claim; and asked for the order sought, to the end that Patten might be compelled to pay such claim; but it did not set forth any admission of the claim by the defendant. An order was made by the surrogate on such application, requiring the defendant to appear before him at a certain day in November following, and "*render an account of his proceedings as administrator, or show cause why an attachment should not issue against him, and also why he should not be decreed to pay the demand or claim of the applicant.*"

At the time fixed by this order, the defendant Patten appeared before the surrogate, and filed a written answer to the application of the plaintiff Ruthven, duly verified by oath. In that answer, he alleged *that Ruthven had no legal claims against the estate of Bailey, that the testator Ruthven presented such claim immediately after his appointment as administrator, which he refused to pay; that he had not seen Ruthven for six or seven years past, and believed from what he said, he intended to give it up, and therefore the defendant had paid over what he had received from the estate to the next of kin. He also averred that more than six years had elapsed, since an admission of the claim made by him in order to give the testator Ruthven a right to a dividend on the estate. His*

answer ended with a denial that the executors of the testator Ruthven had any legal claim upon the estate administrated by the defendant, or had any right to require him to account.

After filing this answer, the counsel for the claimant put in evidence the defendant's written admission, before mentioned, and the hearing of this matter was adjourned. At the adjourned day, the hearing was again adjourned, and on the day of the second adjournment, in November, 1857, the defendant failed to appear. An affidavit by the plaintiffs, denying some part of the defendant's affidavit, was filed, and the inventory of the estate was put in evidence. No account was taken or required, but the surrogate made a *decree that the defendant pay the claim of the applicant, with interest and costs*. In March, 1854, the defendant applied to the surrogate to amend his decree, or alter the minutes so as to conform to certain facts alleged in a petition and affidavit made by him, and to have the decree of November previous, opened; which application was refused, and an order made to that effect by the surrogate.

In May, 1858, the defendant Patten filed a petition of appeal to the supreme court, wherein, after stating the November decree, and the March order, he prayed that the minutes of the surrogate might be corrected, so as to conform to the facts stated therein, and that his default if any, might be opened, and "*said order*" (without specifying which) set aside, and for other relief. In such petition he also set forth the granting of letters of administration to him, the citation issued to him to render an account on a certain day, the filing of his answer on that day, averring that such claim was barred by the statute of limitations, and was illegal; the adjournment of the hearing of such matter, and proposal by counsel on the adjourned day, to appear for such defendant, which was refused by the surrogate. That the decree was made, and no entry of such offer to appear was made in the minutes. That such order *transcended the jurisdiction* of the surrogate. That he had applied to correct the minutes and order, and was refused by the March order. The answer of the plaintiffs to this petition of appeal, controverted the fact of such appearance and offer to appear by counsel, until after the decree had been made; but admitted the citation and decree as alleged. It also alleged that *their claim was just*, and that the administrator *having failed to show cause*, was

Ruthven v. Patten.

ordered to pay it. In April previous, the defendant had filed and served a notice of appeal from the order entered in March, 1858, in this matter, "denying the motion of the administrator "to amend the minutes in said matter, *and* the order or decree "entered therein 'in November, 1857,' *and* to open the default (if any) therein, and from the whole and every part "thereof."

In May, 1859, an entry was made in the minutes of the general term of the supreme court of the district, entitled *in the appeal* of the defendant from such proceeding, and declaring the "decree of the surrogate of Kings county reversed "without costs." On the same day an order or judgment was entered at such general term, which recited the submission of such matter at a general term, before certain justices in February previous, and "that it appeared to that court, that the answer which" the present defendant had put in before the surrogate "substantially contained a plea of the statute of limitations, and "a denial of the validity of the claim of the present plaintiff, "and that such surrogate made a decree directing the payment "of such debt, and that the appeal which the administrator had "taken was from that decree, as well as from the order refusing "to open his default." Then followed, in such order or judgment, an apparent extract from the opinion of the court, reasoning against the right of surrogates to try the validity of claims, where they are disputed by the executors or administrators, and citing various authorities. It then proceeded as follows: "The "decree of the surrogate in the present case was therefore beyond "his powers, and must for that reason be reversed;" and ended with the words "And inasmuch as we reverse for a want of jurisdiction in the court below, we do so without costs."

An order was obtained in July, 1859, to show cause why the appeal before mentioned should not be reargued, and for such other relief as might be just, &c., on the ground that the decree which such order of May, 1859, purported to reverse was not appealed from, and that the court made it under a mistake. On showing such cause, an order was made in September, 1859, containing no reasons, but ordering such cause to be reargued, and proceedings on the part of the appellant stayed. At a general term in February, 1862, an order was made by the supreme court at a general term, on default of the defendant, decreeing

Ruthven v. Patten.

that the order made by the surrogate of Kings county, in March, 1858 ("being the order from which this appeal was taken), should be and is hereby affirmed with ten dollars costs."

In December, 1857, a certified statement of the decree of the surrogate of November, 1857, was filed in the office of the clerk of New York county, and an execution was issued in March, 1858, thereon, to the sheriff of that county by whom it was duly returned, wholly unsatisfied; and on the application of the plaintiffs, and proof of such judgment, execution, and return, the surrogate assigned the administrator's bond of the defendant Patten, on which his co-defendants are sureties, to be sued; and the present action was brought thereon.

The complaint set forth the grant of letters of administration, on the estate of Bailey to the defendant Patten, the execution of his bond by himself and his co-defendants, for the faithful performance of his duties in the usual form required by statute; the existence of a valid claim by the testator of the plaintiffs against Bailey; the presentation of such claim by such testator to the defendant Patten; his written admission of such claim; the death of the testator of the plaintiffs, and his appointment of them as his executors; the application by the plaintiffs to the defendant for payment; their application to the surrogate of Kings county, which was stated to be to show cause, only, why he should not pay the plaintiffs' claim; the issuing of the citation; the subsequent decree of the surrogate of November, 1857, against the defendant; the issuing by him of a certificate containing the substance of such decree, and its filing and docket in the New York county clerk's office; the issuing of execution thereon to the sheriff of New York county, and its return by him unsatisfied; the failure of the defendant Patten to pay such decree; the application to the surrogate for such bond for prosecution, and his order to that effect; and a request to the sureties to pay the debt.

The original answer of the defendants denied the proper filing of any certificate in the New York county clerk's office, and the validity of any judgment or order and execution against the defendant Patten. It alleged that Patten never made the default on which the surrogate's order purports to be founded, but that he appeared pursuant to the surrogate's citation, denied the right of the plaintiffs to call him to account; alleged the

Ruthven v. Patten.

insolvency of the estate, and the existence of other creditors of equal rank; denied the validity of the plaintiff's claim, and the jurisdiction of the surrogate—leaving them to a suit at law in the proper court; that the surrogate made the order illegally; that the defendant Patten appealed from the order of the general term of the supreme court, who reversed the same; that Patten filed a copy of such reversing order with the surrogate; and that afterwards the plaintiffs put such cause on the calendar for reargument, and took the defendant Patten's default, which he has moved to open, that such motion has been argued, and not decided. Such answer also alleged that there had been no accounting by Patten or allowance of his accounts, by the surrogate. A supplemental answer was put in afterwards, in January, 1862, alleging that the defendant Patten's default was opened on certain terms; which, upon appeal by him, was affirmed, and that he complied with such terms.

The issues thus formed were tried by the court at special term without a jury. The court found as facts: (1.) The administration of the defendant Patten, and the execution of the bonds sued on. (2.) The death of the testator of the plaintiffs and their executorship. (3.) An application by the plaintiffs, to the surrogate of Kings county, for a citation to the defendant Patten to show cause why he should not pay such demand. (4.) The decree of the surrogate ordering the defendant as administrator to pay such demand. (5.) The filing of the certificate of such decree, in the New York county clerk's office, and the issuing of the execution, and its return wholly unsatisfied. (6.) The assignment of the bond to the plaintiffs by the surrogate, on the return of such execution, to be prosecuted. (7.) The filing by Patten of an affidavit, on the return of the citation, in opposition to such claim of the plaintiffs. (8.) The amount of interest.

The conclusions of law applied by the court were that the surrogate had jurisdiction of the plaintiff's claim against Patten, and to make the decree or order made by him, for its payment.

E. P. Cowles, for defendants, appellants.

J. A. Ruthven, for plaintiffs, respondents.

BY THE COURT.*—ROBERTSON, J.—Beyond the personal responsibility of an administrator, the creditors of an intestate who has no real estate have no other security for the faithful distribution of the assets of the deceased among them, than his bond, given on issuing letters of administration, in double the value of the estate. In case of the insolvency of the intestate, if one creditor could get judgment on such bond for his own benefit alone, the whole security might be exhausted by a few, to the exclusion of the rest.

An administrator has a right, in an action at law against him, to show that there are unsatisfied debts of a prior class, or unpaid debts of the same class, as that for which such suit is brought (2 *Rev. Stat.*, 88, § 31). In such case, judgment can only be rendered for whatever assets may remain after satisfying debts of a prior class, and be a just proportion of debts of the same class (*Ib.*). An execution can only issue against an administrator, after rendering and settling an account of his administration, or on the order of the surrogate who appointed him (2 *Rev. Stat.*, 88, § 32; *Id.*, 116, § 21). After such account rendered, execution can only issue for such sum as may have appeared on the settlement of the former, to be a just proportion of the assets applicable to such judgment (*Ib.*). The judgment creditor may apply to the surrogate for an order to show cause why such execution should not issue (2 *Rev. Stat.*, 116, § 19).

It is contended in this case, however, that another provision in the Revised Statutes gives a surrogate authority to decree the absolute payment of a debt, without a judgment, although contested, and without any account rendered or any inquiry into the condition of the estate, or amount of claims of a prior or the same class. And that on the decree so made, the creditor in whose favor it was made, has a right for his own exclusive benefit, to recover the amount due, upon the administrator's bond.

That provision permits a surrogate, after six months from the time of granting letters of administration, to decree payment of a debt of the intestate, or a *proportional* part, and one year after such grant, the payment of a legacy, or its *just proportional* part (2 *Rev. Stat.*, 116, § 18).

* Present, MONCRIEF, ROBERTSON, and MONELL, JJ.

Ruthven v. Patten.

The first question that arises, is whether the surrogate can try on such an application the merits of a disputed claim, and decree its payment on simply determining it to be due. If he can, he has far superior powers to a court of law, in which an execution cannot issue until after an accounting, and then only for a proportional part of the assets. This question is fully and ably discussed and decided in the case of *Wilson v. Baptist Educational Society* (10 *Barb.*, 308, 316). It had been previously analysed by the vigorous mind of the late Surrogate OGDEN in *The matter of Kent* (Dayton's Surrogate (1st ed.), *App.*, p. 7; ed. 1855, p. 507). *McGee v. Vedder* (6 *Barb.*, 352); *Jones v. Mason* (5 *N. Y. Leg. Obs.*, 124); *Disosway v. Bank of Washington* (24 *Barb.*, 60); *Andrews v. Wallege* (8 *Abb. Pr.*, 425; *S. C.*, 29 *Barb.*, 350); *Mills v. Thursby* (11 *How.*, 162); sustain the same principle; and lastly, the decision of the supreme court at general term in this very litigation holds the same. It is also held in these cases, that a dispute of the claim before the surrogate, a *contestatio litis*, takes away his jurisdiction. It would be a daring innovation to try to stem the current of such authorities: in fact, it was not attempted on the argument.

It is claimed, however, that the surrogate did not lose his jurisdiction; (1.) Because the claim had been passed upon and *admitted* by the administrator before the application. (2.) By the admission of assets by him, sufficient to satisfy it, and the illegality of all others. (3.) By reason of contradictions in the administrator's affidavit, and his failure to appear at the adjourned day. It is also contended that he had a right to compel an account on the application of a creditor whose claim had been admitted.

It will be necessary in the first case, to separate the jurisdiction of a surrogate to decree payment of debts, or allow the issuing of an execution after an accounting, from that which he exercises in decreeing payment of an admitted debt, separate from all others.

The Revised Statutes (vol. 2, p. 92, § 52) provide that after *eighteen months* from the time of his appointment, an administrator may be compelled to *render an account* of his proceedings, by order of the proper surrogate, upon the application of any person having a demand against the estate of the deceased, and even *without such application*. The contest of the claim

does not affect the jurisdiction, as the surrogate may order the account to be rendered on his own motion (*Kidd v. Chapman*, 2 *Barb. Ch.*, 121). But the power of the surrogate on such an application ends with compelling the rendition of the account of proceedings (*Westervelt v. Gregg*, 1 *Barb. Ch.*, 469; *Smith v. Vankeuren*, 2 *Id.*, 473); unless the creditor has a judgment at law; when he may, under the provisions before cited (2 *Rev. Stat.*, 88, § 32; *Id.*, 116, § 21), authorize an execution for a proper amount to be issued. Such an account is not intended to accompany or assist the provision before referred to, by which a debt may be ordered to be paid in six months after the appointment (2 *Rev. Stat.*, 116, § 18), because it cannot be required until eighteen months after that time.

Upon the application of an administrator, who has been cited to account by a creditor, or without it, the former may procure a final settlement of his account (2 *Rev. Stat.*, 93, § 60; *Id.*, 95, § 70), for which purpose he is to notify all persons interested; only upon that settlement can the surrogate decree distribution, and determine any question as to debts, and the sums to be paid thereon (2 *Rev. Stat.*, 95, § 71). There is no other statutory provision authorizing the surrogate to decree payment of specific debts, except the one previously referred to (2 *Rev. Stat.*, 116, § 18).

The case of *Hall v. Bruen* (4 *Bradf.*, 435) was upon an application by a creditor for an account—not for payment of a debt. In *Kidd v. Chapman* (2 *Barb. Ch.*, 414) the claim was in judgment. In *Flagg v. Ruden* (1 *Bradf.*, 192) the claim was not passed upon, but the exercise of jurisdiction refused. In the matter of *Phyfe* (5 *N. Y. Leg. Obs.*, 331) it was held that the surrogate had jurisdiction to inquire into an admission of a debt; but it was on an accounting—not a petition for its payment.

The effect on the surrogate's jurisdiction of an admission by an administrator of a debt on its presentation, when made with a view of having it refused if disputed, is not fully settled by the authorities. In the matter of *Phyfe* (*ubi sup.*) it was held that the fact of admission as well as of judgment could be tried, and for that purpose the surrogate had jurisdiction. In *Johnson v. Corbett* (11 *Paige*, 265) an admission of a debt was considered to have rendered its presentment for allowance

Ruthven v. Patten.

unnecessary ; but it was not determined whether such allowance did any thing more than affect the question of costs in an action for it, or the payment or distribution of moneys for claims of inferior degree, for legacies, or among next of kin (2 *Rev. Stat.*, 89, § 39).

If there was such an admission in this case, either proved before the surrogate, or not denied, as gave him jurisdiction to decree payment, the supreme court at general term disregarded it, as having no effect where the claim was disputed. They held, however, that the defendant's answer contained substantially a plea of the statute of limitations, and a denial of the validity of the claim. The decree of the surrogate, after reciting the application for a citation, its issue and service, the adjournment of the hearing, and the failure of the administrator to appear and render an account, declares that it appeared to him, that the claim was justly due to the plaintiffs, and that there were assets sufficient in the defendant's hands to pay all the just debts of the decedent ; and orders the payment of the claim. The application to the surrogate was not founded upon any admission of the debt, as a jurisdictional fact. But in what is called a *sworn reply* to the affidavit of the defendant, offered by way of answer in denial of the claim of the plaintiffs, a written admission was stated. This was offered in evidence on a previous day, without such sworn reply being put in, and when the defendant was present, but such reply was put in afterwards, when he was absent. It does not, therefore, appear whether the supreme court considered such admission offered as mere evidence to sustain the claim, or as sustaining the jurisdiction. Even in regard to it, however, the defendant anticipating it, alleged it to have been given more than six years previous, and that it was given for a particular purpose. There also does not appear to have been any evidence taken before the surrogate as to the amount of the assets, or debts. The defendant's answer in the surrogate's court shows he paid over most of the estate to the next of kin long before he gave the admission, and that he refused the claim when it was first presented. It might, therefore, have been questionable whether a decree could have been made in the surrogate's court, notwithstanding the admission,

without disposing of numerous questions of law and fact, affecting the liability of the defendant as administrator.

But a still more important question arises, whether there was any legal existence of a decree by the surrogate for the payment of the debt in question. The notice of appeal to the supreme court from the surrogate declares that the defendant appealed from the order of March, 1858, denying his motion to amend the minutes in such matter, *and* the decree of November, 1857, and to open the default therein, and from the whole and every part thereof. A question might have arisen on that, whether the words "*the decree of November*" were joined by the previous copulative "*and*" with the order of March, 1858, *on the minutes*: the subsequent words, *and to open*, would seem to make it refer to the latter. The order to show cause was in the same form; and the petition of appeal attacks the validity of the order of November, 1857, but only specifies, as the relief sought, the setting aside the order of March, 1858, and other relief. The answer to it, however, denies the order of November, 1857, to be erroneous. But the judgment of the supreme court declares expressly that the November decree was appealed from as well as the March order, and reverses it *without costs*, because such reversal was *founded on a want of jurisdiction* in the surrogate. That judgment has never been recalled or modified, unless the order for a reargument, or that affirming the order of March, 1858, does so. The former, of course, left the judgment to stand, until the reargument was heard. The latter affirmed only the last order refusing to correct the minutes, or decree. It is true, it declared, as did the judgment of reversal, that the March order was appealed from, but not that the November decree was *not appealed from*. This court cannot correct or revise the solemn adjudications of the supreme court. That court, on the first argument, declared what was appealed from, consisting of an order, and decree; and reversed the decree without disposing of the order; and on a subsequent default pronounced an affirmance of it without interfering with their former judgment. While that court is still open for redress, it would be indecorous for us to pass upon the propriety of its records, if we could do so. If their judgment, or second order, does not conform to the views of the judges of that court, the

Bird v. The City of Brooklyn.

application should have been made then. This court cannot determine what was appealed from, when the tribunal has necessarily had jurisdiction to pass upon that question, and has done so.

No facts have been found by the learned judge before whom this cause was tried as to such appeal, judgment, and orders of the supreme court; and there is no contradictory evidence to impugn the records of them if any could be received: but he has found that the defendant appeared before the surrogate, and filed his affidavit *in opposition* to the claim of the plaintiffs, and has applied, as a conclusion of law, that the surrogate had jurisdiction of the claim, and to make the decree made by him. I think this was intended to be in opposition to the principles laid down in the cases before cited.

I think the judgment should be reversed, and a new trial ordered, with costs to abide the event.

BIRD *against* THE CITY OF BROOKLYN

City Court of Brooklyn, April Term, 1866.

COSTS.—TERM FEES.

In an action in the city court of Brooklyn, only five term fees can be taxed.

The practice of the city court of Brooklyn is regulated by the act organizing the court (*Laws of 1849, ch. 102*) in conformity to the practice of the supreme court.

Term fees are allowed in that court; but subject to the same restrictions as in the circuit of the supreme court.

Motion for a re-taxation of costs.

This action was brought by John Bird against the city of Brooklyn. The plaintiff's attorney procured to be taxed by the clerk of the city court of Brooklyn (in accordance with the pre-

Bird v. City of Brooklyn.

vious practice of that officer) a bill of costs including an item of one hundred and fifty dollars, for fifteen term fees. Defendant's attorney now moved for a re-taxation.

Lucien Birdseye, for the plaintiff;—Argued that the prevailing party was entitled by section 307, subd. 7, of the Code of Procedure, to ten dollars for each term at which the cause was necessarily on the calendar and not tried, or is postponed by order of the court, and that the limitation “not exceeding five circuit, and five special and five general terms,” did not apply to the city court, which had no special or general terms or circuits—the terms of the court being all for the same purpose, and having no distinctive name.

D. J. Dean, & Sidney V. Lowell, for the defendant;—Argued: I. That all terms of the city court at which causes were tried by the court and jury, were circuit, for all purposes to which provisions as to circuit trials applied, and that in taxing costs for such cases, they must be so taxed;—and:

II. If not taxed in the same manner as in the supreme court, no costs could be taxed at all, as the only provision for the taxation of costs was the section of the Code referred to (307); and cited the local judiciary act for Brooklyn (*Laws of 1849*, § 4).

GEO. G. REYNOLDS, CITY JUDGE.—Section 307 of the Code, subd. 7, which gives term fees, does not apply to the city court by any provision of the Code (See section 8).

There would, therefore, be no term fees taxable in the city court, but for section 4 of the act organizing the city court, which provides that “all laws regulating the practice of the supreme court, and course of procedure therein, shall as far as applicable apply to and be binding upon said city court.”

Term fees in this court must therefore be taxed as they are in the supreme court. The same restriction applies as at the circuit. The plaintiff can only be allowed for five terms.

No costs of the motion, to either party.

NEWELL *against* WHEELER.*New York Superior Court; General Term, June, 1866.*

RE-ARGUMENT OF APPEAL.—QUESTIONS FOR THE JURY.—MEASURE OF DAMAGES.

In courts other than those of last resort, a re-argument of a cause decided at one general term, should not be ordered by the judges holding another general term, upon allegations of a misunderstanding of the facts, or of an error in reversing a judgment which might have been allowed to stand by reducing its amount.

A new trial, or an appeal, is the proper remedy in such a case.

What evidence of diligence and good faith, in performance of an agreement to keep a patented machine in operation, and pay a royalty upon its products, is sufficient to go to the jury; and of the proper rule of damages in such a case.

It seems, that an exception in a condition annexed to a grant, can not by itself be construed as a positive undertaking.

Motion for a re-argument.

This action was brought by William Newell against Ezra Wheeler, Frederick Lacey, Thomas Roundey, Jr., and O. W. F. Randolph.

It was tried before Mr. Justice McCUNN and a jury, at the March trial term of this court, in 1865.

The action was brought to recover damages for a breach of contract.

The plaintiff alleged that he was the owner and patentee of a patent for cleaning and polishing coffee. That on the 17th day of March, 1858, the plaintiff sold to the defendants the exclusive right to use such patents in the State of New York, and other territory, for the sum of five thousand dollars, and the further sum of six cents for every bag of skimmings, and ten cents for every bag of merchantable coffee passed by the defendants through the process of the plaintiff, and that the defendants should keep an accurate account of every bag of coffee that passed under said process, and render monthly returns

*affirmed
36 May. 24. 66.*

of the same: the defendants having also the privilege of commuting the tolls aforesaid by the payment of the further sum of fifteen thousand dollars, within three years; and that the defendants took the interest aforesaid, paid to the plaintiff the five thousand dollars, and used the patent; and the plaintiff alleges as breaches of said contract:

I. That the defendants neglected to furnish the plaintiff monthly returns of the number of bags of coffee they had passed through said process, and to pay the tolls due for the same.

II. And that the defendants have neglected to keep the plaintiff's interest in said agreement inviolate, by keeping in active operation the said machinery, and have neglected to make the same available and productive, &c.; and demands judgment for damages for such neglect.

The defendants admit the contract, as set forth in the complaint, but allege that the plaintiff, to induce them to enter into the same, represented to them that by its use large sums of money could be made; that great improvement could be made in the appearance of coffee; that its value would be materially increased, and its merchantable quality improved, and its price enhanced; and that it would be made much more saleable; which representations the defendants allege are untrue, and that the process to them was valueless, and claim to recover the five thousand dollars paid, and to have the contract annulled.

They deny that they neglected to furnish the plaintiff with monthly returns of the number of bags passed by the defendants under the plaintiff's process, and they deny that the accounts rendered are not a full and correct statement of all coffee passed by them through plaintiff's process, and up to the commencement of this action, and allege that the same have been fully paid.

They also deny that they have neglected to keep the plaintiff's interest inviolate, by keeping the machine or process in active operation, or neglected to make the same available and productive, or neglected their duty, and allege that they have faithfully kept and performed all their part of the contract; that they have used diligence and good faith in endeavoring to procure employment for the machine or process; but that, by reason of its effect upon the coffee—the loss in weight, the peculiar appearance it imparted to the coffee, the expense of

Newell v. Wheeler.

operating and cost of renovation, and the depreciation in value arising therefrom—it became impossible to obtain any considerable employment for it, and none was obtained for which a true account has not been rendered. The plaintiff replied to the defendants' counter-claim, denying any untrue representations.

On the trial of the action, when the plaintiff had rested, the defendants introduced evidence on their part, to show :

That they had passed through the machine all the coffee that they could ; that it was unprofitable to pass coffee through the machine ; that dealers in coffee refused to purchase coffee passed through this process, and importers refused to have their coffee cleaned by this process ; that it became known as machine coffee ; it lost in weight ; it made the coffee have a glossy appearance ; it lost its aroma ; and finally, coffee skimmings were more saleable, would sell more readily and for a better price than coffee passed through this machine ; and there was no way for the defendants to run the machine to its full capacity except to buy coffee and run it through the machine at a positive loss to themselves.

That the monthly returns rendered by the defendants were a full and complete statement of all coffee passed through this machine, down to the commencement of this action, and for which the plaintiff had received payment.

At the close of the testimony, the learned justice charged the jury generally on the questions of law involved—but subsequently, took from the jury every question, excepting only the question of false representations, on which the jury found for the plaintiff ; the court holding as matter of law, that the contract required the defendants to run the machine to its full capacity at all times, and under all circumstances. It appearing that there could be passed through two machines, at their utmost capacity, two hundred and nine bags of coffee per day, the court multiplied this number by three hundred days to the year for fourteen years, at six cents per bag, deducting at the same rate for the first five years, eighteen thousand eight hundred and ten dollars, in addition to the five thousand dollars paid, and the amount of tolls paid per accounts rendered (nine hundred and fifty-three dollars and nine cents), and accordingly assessed the damages at twenty-three thousand and forty-four dollars, and ninety-one cents, and directed the verdict to be

entered for that amount; and ordered the defendants' exceptions to be heard in the first instance at the general term, with a stay of proceedings.

To each of which rulings of the court the defendants severally and duly excepted.

The case, having gone to the general term of the court on the defendants' exceptions to the ruling of Hon. Justice McCUNN, was elaborately argued at the general term before a full bench, Mr. Justice GARVIN presiding, who rendered the following opinion in the case.

BY THE COURT.—GARVIN, J.—Several breaches of an agreement between the parties are set out in the complaint:

I. A failure to make returns of the work done by a machine for cleaning coffee, and to pay over on the first of every month a certain per centage for every bag of coffee and skimmings passed through Newell's cylinder process or machine.

II. Not keeping the machine in active operation, and neglecting to make the same available and productive, as provided for in the agreement between the parties, for which plaintiff claims damages and costs.

The defendant answers that the right to use the invention, machine, and process, turned out valueless; deny the breaches set forth in the complaint, and claim that they have kept and performed all the conditions in the agreement.

That they were unable to make the machine profitable, by reason of its own inherent worthlessness.

The defendants also set up a counter-claim for the purchase money, and claim reimbursement therefor, by reason of fraud on the part of the plaintiff.

The action was tried before a justice of this court and a jury.

The jury rendered a verdict for the plaintiff, and the court assessed the damages at twenty-three thousand and forty-four dollars and ninety-one cents.

The court ordered the exceptions to be heard in the first instance at the general term.

Evidence was given by the defendants upon the question of diligence and good faith in keeping the machine in operation; and in endeavoring to procure employment for it; as to rendering periodical accounts of work done by the machine, of

earnings and per centage belonging to plaintiff, and as to how much of this per centage had been paid by defendants to the plaintiff.

All these issues were controverted, and were questions of fact for the jury.

The court erred not only in not submitting these questions to the jury, but also in taking from the consideration of the jury the question of damages.

The true rule of damages in this case is the plaintiff's per centage upon the difference between the account rendered and paid to the plaintiff by the defendants of coffee passed through the machine, and the amount that by reasonable or proper efforts the defendants could have procured and passed through it.

If the accounts were not accurate as rendered, then the plaintiff would be entitled to his per centage upon the work actually done, not embraced in the accounts, in addition.

We think the exceptions on the part of the defendants are well taken, and must be sustained.

A new trial should be ordered, with costs to the defendants to abide the result.

MONELL and JONES, JJ., concurred.

The plaintiff's counsel, after the opinion had been rendered, made a motion at a subsequent general term, for leave to re-argue the case, upon grounds which fully appear in the opinion of the court.

Elbridge T. Gerry, for the plaintiff, respondent.

William D. Booth, for the defendant, appellant.

BY THE COURT.*—ROBERTSON, Ch. J.—This was a motion on the part of the plaintiff for a re-argument of a former motion for a new trial made by the defendants, upon exceptions taken at the trial, and directed to be heard in the first instance at the general term, on which an order had been made granting a new trial. It was made upon three grounds :

I. That the court, in its opinion delivered on granting such

* Present, ROBERTSON, Ch. J., and MONELL and GARVIN, JJ.

motion for a new trial, had assumed facts disproved by the record, and misstated them in such opinion.

II. The rule of damages laid down in such opinion was based upon such erroneously assumed facts; and

Lastly. That the court having all the facts before it, should have corrected any excess of damages, when there was only a question of amount, instead of granting a new trial.

The action was brought to recover damages for the non-performance by the defendants of certain undertakings alleged to have been entered into by them in March, 1858, by a certain instrument in writing then signed by all the parties; such instrument relates to the use by the defendants of a certain coffee cleaning and polishing machine, for which the plaintiff had in November previous taken out letters patent. The defendants, Wheeler, Lacey & Roundey, were at the time of signing such instrument, partners in business, as dealers in coffee, under the name of Wheeler, Lacey & Co.

Such instrument, after reciting the grant to the plaintiff of the letters patent for such machine, and a desire of the defendants to become interested, granted an indefinite interest therein upon certain conditions, which followed. These were—

That a certain sum (\$5,000) having been paid, and certain different specified sums being payable for every bag of merchantable coffee or skimmings that passed through the process conducted by such machine, the defendants were to keep and render to the plaintiff accurate monthly accounts of the bags of coffee submitted to such process, and pay him on the first of every month the sums so to be paid to him. But, if the defendants failed to perform any part of such agreement, it was to become void and of no effect; the gross sum so paid (\$5,000), with a wire cylinder to be furnished by the plaintiff, was to be forfeited to him. The second condition mentioned in such contract was that the five thousand dollars paid to the plaintiff was to be refunded out of the earnings of the machine whenever the plaintiff's share exceeded two thousand dollars. The third condition mentioned in such agreement was, "that the plaintiff was not to be prejudiced by any misunderstanding or litigation or other contingencies between the defendants," but that his interests should "be kept inviolate by keeping in active operation the machinery therein contemplated

and used by the defendants, so that it may be made available and productive and payable, as thereinbefore provided for." The fourth condition stated in such instrument was that the defendants should make no sale or transfer of such patent rights except by the plaintiff's consent, indorsed on and made part of such agreement. After such conditions, such instrument, in consideration of them, and in compliance therewith on the part of the defendants, assigned to them "the exclusive right of using such patent right in the States of New York and Connecticut," and, with the exception of two counties, which the plaintiff reserved to himself, the State of New Jersey.

A privilege was also given therein to the defendants to commute the payment of the sums reserved to be paid to the plaintiff on each bag of coffee passing through his machine by paying a certain sum (\$15,000). The plaintiff also bound himself thereby to prosecute all offenders who infringed on such patent, and to furnish iron cylinders desired in addition to that one agreed by him to be furnished, at the price of six hundred dollars each.

The complaint, after setting out such agreement, and the compliance by the plaintiff with every obligation entered into by him thereby, alleges as breaches thereof—

1. A failure by the defendants to make monthly returns of the number of bags of coffee passed by them through the plaintiff's process, and pay him the sums stipulated in such agreement therefor, although a large number of bags were passed through such process; and,

2. A neglect by the defendants "to keep the plaintiff's interest in such agreement inviolate by keeping in active operation the machinery in said agreement, contemplated and used by the defendants, and make the same available and productive."

It prays damages for such neglect so to keep such interest inviolate, and demands any other equitable relief to which the plaintiff may be entitled.

The defendants' answer sets up, by way of counter-claim, a demand for the five thousand dollars paid by them for the grant of the right to use the plaintiff's patent, which sum they allege was obtained by knowingly false representations of the

plaintiff as to the benefits to be derived from submitting coffee to the patented process, conducted by his machine. The defendants also set up, as a defense, such false representations; controvert any neglect to make monthly returns of coffee submitted by them to the plaintiff's process; deny rendering any false ones, and allege payment of all sums due the plaintiff for the bags of coffee so submitted by them to such process. They set out particular defects in the process of the plaintiff, rendering it valueless, and preventing persons from having coffee submitted thereto, and allege it to be wholly worthless.

On the trial, some evidence was given of the unsuccessful efforts of the defendants to procure work for such machine, which is referred to in the opinion of the court. Some evidence was also given of the insufficiency of accounts rendered by the defendants of the work done by a machine furnished by the plaintiff according to his patent, referred to in such agreement, and consequent deficiencies in the payments made by the defendants of the agreed tolls for work done by such process specified in such agreement.

On the trial, the judge before whom the action was tried took away from the jury "all consideration of the question whether the defendants had exercised diligence and good faith in * * keeping the machine in operation and endeavoring to procure proper employment for it," and instructed them that the only question for them was "whether the plaintiff had been guilty of any fraud in effecting the sale to the defendants," and directed them if they found for the plaintiffs, to find a certain sum (twenty-three thousand and forty-four dollars and ninety cents), for their damages. This sum was claimed to be arrived at by multiplying the lowest toll mentioned in such agreement of March, 1858 (six cents), by the number of bags which the evidence showed could be cleaned by such machine daily (two hundred and nine), and that again by three hundred, as the number of working days in each year, and that again by nine, as the number of years it could be worked, and deducting the five thousand dollars paid, and a certain sum (nine hundred and fifty-three dollars and nine cents), paid by the defendants to the plaintiffs for the tolls due him under such agreement. To all of which withdrawals, directions and instructions, defendants excepted.

The plaintiff now applies for a re-argument of the motion for a new trial on exceptions of the defendants, taken on the trial and ordered to be heard, in the first instance, at general term. Such motion is made, not upon the ground of any oversight or mistake upon a question of law, but of a misunderstanding, by the court, of facts or evidence in the case, which has induced it to think that certain questions of fact ought to have been submitted to the jury, and with their submission the question of damages also; and also upon the ground that if there was any error in the damages the court could and should have corrected it by the evidence, by giving the plaintiff an opportunity of remitting the excess. Such an application is rather a novel experiment in correcting judicial errors, by bringing the opinion of one general term before another, differently constituted, for the purpose of criticizing the soundness of its views upon the facts which the evidence before it tended to establish. Such a mode of review, whatever deference may be paid to, or felt for, the action of the former general term, would be very apt to lead to disrespectful comments upon the conduct of the court, and, at least, to reflections on the diligence with which the case has been examined on the first occasion. For this reason, it seems to me both just and proper that the moving party should secure from the prior court some acknowledgment of oversight or error, in order to make such a proceeding very decorous.

It is true no courts are infallible; but the usual mode allowed by law for correcting the errors is by appeal; and it is only in courts of last resort, where there is no other remedy for an oversight or mistake, that re-arguments are permitted, unless in extraordinary cases; and there only upon the failure to present or notice an important legal question, or a recent statute or decision (*Mount v. Mitchell*, 19 *Abb. Pr.*, 1; S. C., 32 *N. Y.*, 702). It is only upon some acknowledgment of error by an inferior court, that the same court should tolerate a re-argument, which may delay a decision of the case without any benefit gained, but a possibility of a change of opinion. It is clear no re-argument should be ordered merely for a present apparent preponderance of evidence on one side, when the evidence is conflicting, and a previous general term has decided against the preponderance of such evidence. A new trial, or an appeal, is the proper remedy for such error. In this case, therefore, it will only be

necessary to examine the evidence so far as to ascertain whether there were any material facts upon which there was such evidence as to require them to be submitted to the jury, and perhaps whether they were those mentioned in the former opinion of this court.

The opinion of this court, delivered in this case at a former general term, which is made the basis of the present application for a re-argument, placed its order for a new trial upon two grounds: 1. That certain questions of fact were not submitted to the jury, which ought to have been; and, 2. That the question of damages was not submitted to them;—the latter being perhaps rather a consequence of the former. It also took occasion to lay down what it considered the true rule of damages, as founded upon the result of the finding of the jury upon such questions of fact. Those questions of fact are, diligence and good faith of the defendants in keeping the plaintiff's machine in operation, the propriety of the accounts rendered by them of the work done by such operation, and lastly, the correctness of the amounts paid to the plaintiff as his share of the earnings by such operations.

It seems to have been assumed, both on the trial and the former argument, that by the agreement of March, 1858, entered into by the parties, the defendants undertook to keep in operation and make every effort to supply with work, while so in operation, the machinery alluded to in such agreement, and for which the plaintiff furnished the iron cylinders mentioned in such agreement, and which is called therein "*the machinery herein contemplated and used by the defendants*," merely to enable the plaintiff to receive the specified tolls. This appears to have been done on the assumption that the exception to the third of the conditions mentioned in such agreement, upon which the plaintiff assigned the right of using his patent, and in which such machinery is mentioned, created an obligation to run such machinery constantly on the part of the defendants for the plaintiff's benefit. For the purpose of testing the plaintiff's right to a re-argument, upon the first ground urged, to wit: that there was no evidence in the case authorizing the submission of the questions of fact, alluded to in the opinion of this court already mentioned to the jury, I shall assume, for the present, that the defendants were so bound. The grounds of the

motion, as urged, are that the court mistook and misstated the facts upon the argument before us. The only facts alleged, in the opinion of the court, on which a new trial was granted, to have been misstated, are that "evidence was given by the defendants upon the question of diligence and good faith in keeping the machine in operation, and endeavoring to procure employment for it," and also as to the other matters before mentioned, as to accounts and payments. Assuming that evidence may properly be designated as "facts," the plaintiff's counsel seems to labor under an error in supposing that he has detected an oversight in such statement. In the first place there was evidence that the machine was kept by the defendants in running order, and it is to be found in the letter of the defendants, Wheeler, Lacey & Company, dated in May, 1862, introduced by the plaintiff, and the testimony of the defendants, Lacy & Randolph, and the brother of the latter.

The defendant Randolph testified that "he had solicited custom for it," and "urged its use." His brother (Lewis) testified that he knew of such efforts of the former, and made efforts himself for the same purpose. A great deal of evidence was given to show the worthlessness of the process, the reluctance of coffee dealers to use it, and the unsaleability of coffee prepared by it, which sustained the futility of such efforts. The plaintiff's counsel was, therefore, evidently mistaken in supposing that there was no evidence to go to the jury upon the question of the defendants' good faith in endeavoring to keep such machine employed. But it is said there is overwhelming evidence in the case, that the defendants, by their abuse of the process and the use of deleterious ingredients, had ruined the reputation of the machine, and thus rendered their own efforts to procure work for it abortive. Assuming this to be so, the court clearly do not appear to have mistaken or misstated any facts in relation thereto; it may have been in error in regard to the law, and supposed that such misconduct of the defendants, if proved, did not deprive them of the right of showing, as a defense to the plaintiff's action, that they could not, with reasonable diligence, have procured work for the machine; but that furnishes no reason for a re-argument, whatever ground it may form for an appeal. But I am not prepared to say, and no part of the testimony has been pointed out to us sufficient to justify the as-

sertion, that the evidence as to the injury done by the defendants' acts to the character of the machine, and its consequent disuse, was so overwhelming as to have warranted the judge on the trial in withdrawing the consideration of that question, if material, from the jury, and instructing them that the disuse of the machine by customers was due to such misconduct of the defendants. The use of plumbago to give color to the coffee, and soapstone to make its refuse rise and be thrown off, was the principal cause of complaint. There was conflicting evidence as to the propriety of their use, and the witness, Louis Randolph, testified that the plaintiff instructed him that "when the coffee was a little old and dry, and it would not come up very quick, a little soapstone would assist it," and to use plumbago "to color the bleached peas, to make it look all sound, beautiful colored dark coffee." That he "only used it a month or six weeks, and possibly once or twice since, and only in extreme cases, and when the beans were very badly bleached," and that generally they did not use them. The plaintiff, it is true, denied such statements under oath, and testified that he remonstrated with such witness for running the machine at too great speed, producing excessive heat, which caused the result, rendering the use of soapstone necessary; but such remonstrance, as well as the result, was denied by the witness; so that the evidence was sufficiently strong on both sides, and so conflicting as to have warranted the learned judge before whom the cause was tried, in submitting to the jury the questions, whether the defendants' mode of using the machine had destroyed its character, and if it did, whether such mode of using it had not been sanctioned by the plaintiff. Such a state of the evidence is very far from convicting the court of so mistaking and misstating facts in stating in their opinion that there was evidence of the good faith and diligence of the defendants in employing such machine, as to justify a re-argument. If they were right in that view, the order for a new trial was correct, without reference to the other facts mentioned in the opinion, which are the rendering of accounts and payments to the plaintiff, on which, we think, on a thorough re-examination of the case, there was sufficient evidence to warrant the submission of the questions of fact contained in them to the jury, unless the de-

Newell v. Wheeler.

defendants were not to be made liable for what they did, but only for what they omitted to do.

It is not necessary to give such evidence in detail. It is true the amount paid to the plaintiff was agreed upon, but the amount due depended upon the work done, and evidence was given of what work the machine could do, to throw on the defendants the burthen of proving that the machine has done less from causes beyond their control. In any event, a mistake at general term in such matters on the part of the court, will not affect questions on a new trial, where the evidence may be entirely different.

The question of damages was clearly one which should have been left to the jury, if the diligence and good faith of the defendants in procuring employment, and their actual employment of the machine, were proper questions to be considered by them.

The rule of damages, as laid down in the former opinion of this court, seems to me to be the only one applicable to the case, as it came before it, if the defendants are to be made liable at all. How far such rule will be applicable in any future trial cannot be known; but I have been unable to find, either expressly or by implication, in the agreement of March, 1858, any undertaking by the defendants to run the machinery under the plaintiff's patent at all. Such instrument consists of three parts: first, a grant of an undefined interest in the plaintiff's patent for certain considerations, and upon certain conditions, which are specified, and a forfeiture of the rights of the defendants to the money paid in case of failure on their part to perform what they undertake thereby; second, a grant of an interest, which is described in such patent, in consideration of such preceding conditions; and third, an agreement by the plaintiff to allow the defendants to commute their payment of a portion of the profits received for a gross sum, to prosecute for infringements of the patent, and to furnish cylinders at a certain price. The only clause relied upon to create an obligation of the defendants to run such machine is, that in the third condition of that part of such agreement, that grants an indefinite interest in the plaintiff's patent, that provides that the plaintiff should not be prejudiced by "any misunderstanding or litigation between the defendants,

but his interest should be kept inviolate by keeping in active operation the machinery therein contemplated and used by the defendants, or their successors, so that it may be made available and productive and payable, as therein provided." But such agreement contained no provision for making it available and productive, but only one for paying certain sums if it were.

I feel at a loss to understand how a mere exception to a condition of a grant can be construed by itself into a positive undertaking, particularly as, while stating that such machinery is to be kept in operation, it does not state by whom. The whole instrument was evidently a grant of a right to use a patent in certain States for a specified sum and a toll on every bag of coffee on which it was employed, which sum was to be deducted from any future earnings; the use of the machine by the defendants was to depend on their own sense of self-interest. A remedy for the omission of the defendants to perform any part of such agreement was expressly provided, in such instrument, for the plaintiff, by a forfeiture of the specified sum paid (\$5,000), and the large iron cylinder to be furnished by him. If the defendants found it to their interest to go on, they were entitled to be reimbursed the sum so paid, out of the plaintiff's share of the money of such machine. If the defendants were bound to work the machine and did not, the plaintiff could have sequestered the sum received by him, cancelled the grant, taken back his cylinder, and carried on the operations himself. In the face of such an express provision, I do not see how any contract could be implied to work the machine, or the defendants be liable for all damages sustained by not doing so. Such questions will, however, in any event, have to be disposed of on the new trial ordered.

In regard to the question of damages, it could not have been disposed of until the finding of the jury upon the other material facts was determined, and, therefore, the failure of the court to order a deduction instead of a new trial, which is always a matter of discretion, forms no legal ground for complaint.

The motion for a reargument is therefore denied, with costs.

THE PEOPLE *against* LAMB.*Court of Appeals ; January Term, 1866.*

CRIMINAL LAW.—EVIDENCE.—CHARGE OF THE JUDGE.

On a trial for murder, there being no evidence that the deceased assaulted the prisoner, evidence of the quarrelsome character of the deceased is inadmissible.

Where the prisoner was assaulted, it is admissible. It is fundamental to the admission of this class of testimony, that knowledge of the character of the deceased, must be brought home to the knowledge of the defendant himself.

To excuse taking human life, in self-defense, the jury must be satisfied that the accused was justified, in forming the conclusion from the facts before him, that his life was in danger.

Good character of the accused is of value, not only in doubtful cases, but will of itself sometimes create a doubt, when none could exist without it, and should turn the scale in favor of the accused.

If the jury have a doubt as to what degree of guilt to convict, it is their duty to convict of the lesser degree.

The law presumes malice from the mere act of killing, where the killing is proved to have been done by the accused, and nothing further is shown.

Writ of error.

Roger Lamb, the plaintiff in error, was tried and convicted of the murder of his wife, at the March term of the court of general sessions, 1865, A. D. RUSSEL, city judge, presiding; and the prisoner was sentenced to be executed. Upon the fifth of May following, a writ of error and stay of execution was obtained, and the case carried to the court of appeals. Upon the trial, the plaintiff in error offered to prove the character of the deceased, which was excluded, and exception taken. This, with certain exceptions taken to the judge's charge, constituted the grounds upon which a reversal of the judgment was asked upon the part of the prisoner. The facts and circumstances of the homicide, and the points upon which a new trial was ordered, will fully appear in the opinions of the court.

A. Oakey Hall, for the people

William F. Kintzing, for the prisoner.

DAVIES, Ch. J.—The prisoner was indicted and convicted in the New York General Sessions for the murder of his wife, Joanna Lamb. The prisoner and his wife occupied a room in Sixth avenue, in that city, and at the time of the homicide there were present in the room the prisoner and his wife, Ann Kennedy, Mary Riley, Bridget Curtis, and a little girl named Joanna Clifford, who was the daughter of the deceased by a former husband, and then aged about eight years. The prisoner and his wife, according to the testimony of Kennedy, came together into the room about six or seven o'clock in the evening. The first thing the witness observed was that the prisoner applied a vile epithet to the deceased, and then made at her with his fist. The prisoner was prevented from assaulting his wife by the witness and another woman, or rather the assault intended for her was inflicted upon the witness. The prisoner then took a stick and attempted to hit his wife, but was prevented by the woman Riley. He then struck the deceased with his fist; soon the prisoner had a knife in his hand. The witness then left the room to procure some water for the deceased, which she said she wanted, and on her return she met the prisoner going out; he passed her. She found the deceased in the room, all covered with blood. Mary Riley, the little girl, and Bridget Curtis were there in the room with deceased. She testified that at this time the deceased made no attempt to strike the prisoner. She identified the knife as that of the prisoner, and there was no question made but that the prisoner inflicted the fatal wound, of which the deceased died. Mary Riley testified that the deceased came in about two minutes before the prisoner, and her statement of what occurred up to the time Ann Kennedy left the room was similar to that made by her. The prisoner, according to the witnesses' statements, got his two hands on her chest and pitched her over against the bed, and she fell between the bed and the stove; when she arose the deceased was bleeding, and the witness said to the prisoner, "You murderer, you killed your wife." He made no reply, but stooped down, tied his shoes and walked out. She

The People v. Lamb.

also testified that the deceased did not go near the prisoner at all, but he ran at her. On this night she never saw the deceased raise hand or foot against the prisoner. Bridget Curtis, the other person present in the room, as testified to by the other witnesses, was in bed, and she says asleep, and the noise of the tussle awoke her. When she awoke the deceased was bleeding, lying on the floor. The prisoner was then in the room, and did not remain, but went out.

Joanna Clifford, the other person present, testified to the same facts as the other witnesses, as to the conduct of the prisoner, and his assault of the deceased; and added that after he knocked Mrs. Riley down he came alongside of the deceased and stabbed her in the neck with a black-handled pocket knife; he stabbed her once; the witness was sitting on her lap at the time he stabbed the deceased.

For the defence, Mary Driscoll was called, who testified that she was in this room on the evening of the homicide, and that the prisoner went out and as he went out, the deceased then flung the lid of an iron kettle after him at the door, and he came back and made a blow at her with his hands. She afterwards testified, that at the time she threw the lid at him, he came back in fifteen minutes and sat in the chair. The little girl, Joanna Clifford, testified that she went for officer O'Day, and he testified that when he went to the prisoner's he found Ann Kennedy, Mrs. Riley, and Bridget Curtis there, and the little girl was there. He also testified that he did not see Mary Driscoll there, and Ann Kennedy and Mary Riley both swear that Mary Driscoll was not there that evening. And the same inference may be drawn from the testimony of Bridget Curtis and the little girl Joanna. I think the jury might have been warranted in finding that Mary Driscoll was not present at the time of the homicide; and even if she was, that her testimony as to any provocation having been offered by the deceased, or any assault made upon the prisoner by her, or any attempted or threatened, was wholly unsupported by any evidence, or any corroborating circumstances. The jury might well say there was not a scintilla of evidence to sustain the theory of the prisoner's defence: namely: that when the prisoner struck the blows, which caused her death, he had reasonable ground to apprehend a design on the part of his wife to do him some great

The People v. Lamb.

personal injury or bodily harm, and that therefore, he believed there was imminent danger of such design being accomplished.

I cannot discover, from a very careful examination of the testimony in this case, any ground upon which such theory rests. Assuming, for the sake of the argument, that Mary Driscoll was present at the time of the occurrence, and that her statement of what transpired is to be credited, then this defence is equally baseless. For, according to this statement, the only ground he had to apprehend a design on the part of his wife to do him some great personal injury or bodily harm, and from which he could believe there was imminent danger of such design being accomplished, was the circumstance, that as he was leaving the room in which the deceased was, she threw the lid of an iron kettle after him at the door. Now there was no evidence that he knew or saw this thing thrown after him, but the strong inference is that he knew nothing about it. He was going out of the room, and it was flung after him, at the door; or as I understand it, as he was passing out the door. There is no evidence it attracted his attention in any way, or that it hit him, or came near hitting him. It was not a weapon, in the hands of a woman, thus thrown, of a very deadly character, or if he had seen it or known of its being thrown, much calculated to excite an apprehension in his mind that his wife intended to do him some great personal injury or bodily harm. As it does not appear that he knew anything about it, it is an obvious and material inference that no such apprehension was excited or had any existence. Again, this occurrence was at least, according to Mary Driscoll's statement, fifteen minutes before the altercation arose in which he inflicted the fatal wound upon the deceased. During that period he had sufficient time to cool; and as no renewed attempt was made, either by threats or acts, to inflict any injury upon him, it is not seen how this circumstance can be invoked to aid the prisoner in establishing the existence of any such apprehension at the time of the homicide. It cannot be pretended that any previous apprehension can afford any justification. It must be an apprehension existing *at the time* the prisoner struck the blow.

It becomes now necessary to examine the particular evidence offered by the counsel for the prisoner, and excluded. The prisoner called a witness, not present at the time of the homi-

The People v. Lamb.

cide, to speak of the general character of the deceased. Good character on the part of the prisoner has always been admitted, as it tends, when established, strongly to show that the accused could not have been guilty of the crime charged; and such good character is a leading element in establishing the innocence of the party accused. But it is certainly novel, in the administration of criminal justice, that the bad general character of the person slain can either tend to show that the party charged is not guilty of the homicide, or in any sense mitigate the crime of taking life. Equality before the law is a maxim of criminal justice, and the life of the humblest and most abandoned is equally entitled to the protection of the law as that of the most cultivated, refined, or elevated. It is not for man to say which shall be taken and which spared.

The defendant's counsel put three questions: 1. Do you know the general character of Mrs. Lamb—that is, whether she was a fighting, vindictive, brutal nature or not? 2. Was Mrs. Lamb of a quarrelsome, vindictive, and brutal character? 3. What was her general character for peace and quietness? These three questions were severally objected to by the counsel for the people, and the objections sustained, and the counsel for the prisoner excepted; and these exceptions present the only questions arising upon the evidence. It is conceded that such evidence can only be proper in a case where the evidence shows that there was an assault committed or threatened by deceased upon the prisoner, and a doubt was created whether the homicide was perpetrated from malice or to repel an assault, and from a principle of self-defence. Now, it has been shown, and, it is submitted, conclusively so, that no such question legitimately arose upon the evidence in this case. The deceased was not shown to have committed any assault upon the prisoner, nor did she threaten to commit any. There was no foundation, therefore, for the position that the prisoner committed the homicide in self-defence, or from any apprehension of any great or any bodily harm. The testimony could, therefore, have been properly excluded on the ground of its irrelevancy; and I cannot see that it was admissible upon any principle, upon the facts proven upon this trial. The defense set up must be such as the facts developed will sustain, and if no assault upon the prisoner has been committed or threatened,

The People v. Lamb.

then the defendant's counsel concede, the evidence of character of the deceased is inadmissible. It must be an assault committed or threatened at the time of the homicide, or so immediately preceding it, or so intimately connected with it, as to justify the taking of life in self-defense, or to ward off great, impending and imminent danger of bodily harm. It is unnecessary to recapitulate the evidence to show that no such state of circumstances existed here.

That these views are abundantly sustained by text writers and authority, a reference to some of them will satisfactorily appear. Wharton, in his *American Criminal Law*, § 641, thus lays down the doctrine:—"On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused, and others, to be a quarrelsome, riotous and savage man, is inadmissible. In the eye of the law, to murder the vilest and most abject of the human race, is as great a crime as to murder its greatest benefactor. In one or two cases, however, while the law, as above laid down, was distinctly recognized, it has been said, that when the killing has been under such circumstances as to create a doubt as to the character of the offense committed, the general character of the deceased may sometimes be drawn in evidence; but the rule undoubtedly is, that the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*, for it is a barbarous thing to allow A to give as a reason for his killing B, that B's disposition was savage and riotous." Wharton, in his *American Law of Homicide*, also (page 249), says: "It has already been briefly considered how far the character of the deceased for peace and order may be drawn into question, when the defense taken is, that the defendant, from all the circumstances in the case, of which the deceased's character is one, had reason to be in fear of his life. As was then shown, there have been cases in which courts have been obliged to allow such evidence to be introduced, and it is easy to imagine cases in the future in which it would be impossible to exclude it, but as a general principle the rule continues unbroken, that evidence that the deceased was riotous, quarrelsome and savage, is inadmissible, even though such knowledge be brought home to the defendant himself; any other rule would allow a private citizen

The People v. Lamb.

to take upon himself the province of government in the punishment of crime."

Thus it is seen, that as a general principle, such evidence is inadmissible. But when admissible, it must be in a case where the defendant had reason to be in fear of his life, or had reasonable grounds to apprehend great bodily harm. Neither of these essential pre-requisites appeared in this case. Again, it is fundamental to the admission of this class of testimony in a proper case, that knowledge of the character of the deceased must be brought home to the knowledge of the defendant himself. It might be presumed that a man would know the character of his wife in this respect, yet I think this would not dispense with the rules, that it should affirmatively appear, that the defendant had such knowledge, before a foundation can be laid for the introduction of this testimony. The authorities cited to maintain these propositions, are :

Quesenbury v. State, 3 *Stewart & Porter*, 315 ; *State v. Tackett*, 1 *Hawks*, 210 ; *Wright v. State*, 9 *Yerg.*, 342 ; *State v. Jackson*, 17 *Mo.*, 544 ; *State v. Tilley*, 3 *Ired.*, 424 ; *State v. Fields*, 14 *Maine*, 248 ; *Com. v. York*, 9 *Metc.*, 110 ; *State v. Thawley*, 4 *Harring.*, 562 ; *Com. v. Hilliard*, 2 *Gray*, 294 ; *Oliver v. State*, 17 *Alabama*, 687 ; *Com. v. Siebert*, *Whar. Homicide*, 227-228.

To these citations others may be added : *Munroe v. State*, 5 *Geo.*, 85 ; *Pritchett v. State*, 22 *Ala.*, 39 ; *Franklin v. State*, 29 *Ala.*, 14 ; *State v. Hicks*, 27 *Missouri*, 588 ; *State v. Barfield*, 8 *Ired.*, 344.

It will be profitable to advert to the facts presented in some of these cases and the point ruled as adjudicated. In *Monroe v. State*, the court, upon the trial of the prisoner for murder, refused to allow evidence of the violent character of the deceased. LUMPKIN, J., in the opinion of the court, says : "It is further argued that the court erred in rejecting evidence which went to show that the deceased as a violent, rash and bloody minded man, reckless of human life, &c. As a general rule, it is true that the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under such circumstances that showed he did not believe himself in danger. Yet, in case of doubt whether the homicide was perpetrated in malice or from a principle of

The People v. Lamb.

self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated, and in this view we think the evidence was improperly ruled out. Reasonable fear, under our Code, repels the conclusion of malice, and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted?"

In *Prichett v. State* (22 *Ala.*, 39), the prisoner was indicted for murder. The court held, that inasmuch as defendant had not been assaulted, and the killing of the deceased by him would be murder on the testimony, however bad might have been the character of the deceased, the court below properly excluded all evidence on that subject.

CHILTON, Chief Justice, in the opinion of the court, says: "But however bad or desperate the character of the deceased may be, and however many threats such person may have made, he forfeits no right to his life, until by an actual attempt to execute his threats, or by some act or *demonstration at the time of killing*, taken in connection with such character or threats, he induces a reasonable belief, on the point of the slayer, that it is necessary to deprive him of life, in order to save his own, or prevent some felony upon his person."

In *Franklin v. State*, the court, *per* WALKER J., says:

"Whenever such bad character on the part of the deceased thus illustrates the circumstances attending a homicide, and the circumstances so illustrated tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character as mingled with the transaction, is a part of it, and is indispensable to the correct understanding. * * * * When the conduct of the deceased, although in itself innocent, is such that, illustrated by his character, its tendency is to excite a reasonable belief of imminent peril, the evidence ought to be admitted, and the question of its effect left to the determination of the jury.

In *Com. v. Siebert* (*supra*), Judge CUNNINGHAM said to the jury, "You may inquire, too, whether the deceased, making as is contended, the first assault, was bold, strong, and of a violent and vindictive character, and the defendant much weaker, and of a timid disposition, and therefore their power

The People v. Lamb.

was equalized by weapons in the hands of the latter. * * * In the assault of a strong man upon a boy, or a female,—of a powerful individual upon a weaker one, the necessity of taking life in self-defense under an ordinary attack will be more easily discoverable than in an attack by one man upon another, under more equal circumstances.” In *Duke v. State (supra)*, the court through PERKINS, J., say, “As a general rule, it is the character of the living,—the defendants on trial for the commission of crime, not of the person on whom the crime was committed, that is in issue, and as to which, therefore the evidence is admissible.”

In *State v. Hicks (supra)*, the court, *per* RICHARDSON, J., says, “If the defendant killed Mills under circumstances that showed that he did not have reasonable cause to apprehend immediate danger of violence to himself, on the ground of vicious character of the deceased, for the law promises the same protection to all men, and it is as great a crime in the eye of the law, to kill without cause, a bad man as a good one.

In *Wright v. State (supra)*, the prisoner was indicted for stabbing Underwood, a free man of color. Upon the trial, the defendant's counsel offered to prove that Underwood, the prosecutor, was a turbulent, violent, saucy fellow. There was no proof in that case that he had assaulted the prisoner. The supreme court, by TURLEY, J., says: “The second cause assigned as error is, that the court refused to hear proof to show that the prosecutor, Underwood, who is a free man of color, was a turbulent, insolent, saucy fellow. We think there was no error in this; for supposing him to have been of the character described, we cannot see how this would have extenuated the offense of stabbing him.” In *State v. Tilly (supra)*, the prisoner was indicted for the murder of one William G. Martin. There was no evidence on the trial showing or tending to show that the prisoner had been assaulted by the deceased, and in this particular, the case is identical with that at bar. The prisoner's counsel proposed to inquire of one of the witnesses, “whether the deceased did not bear the character of being high-tempered, overbearing and oppressive towards his overseers and tenants,” but the question was objected to and excluded, and the ruling sustained. And the same doctrine was affirmed in the case of the *State v. Benfield* (8 *Ired.*, 344). The prisoner was not as-

The People v. Lamb.

saulted by the deceased, nor was deceased guilty of any acts of violence whatever. The counsel for the prisoner then offered to prove by the witness, who had formerly lived with the deceased, that his general character was that of a violent, overbearing and quarrelsome man, and that such were his domestic habits. On objection made on the part of the State, the court rejected the evidence; this ruling was sustained. RUFFIN, Ch. J., said, the law no more allows a man of bad temper and habits of violence to be killed by another, whom he is not assaulting, than it does the most peaceable and quiet men. * * * No such principle or decision is found, as that a person may kill another because from his former course of life as a fighter, he apprehends an assault from him, though it be even a violent one. * * * It is the fact, and not the fear of an assault, that extenuates the killing, upon the supposition that it instantly rouses the resentment to an uncontrollable pitch. Tuckett's case in 1 *Hawks*, the Ch. J., says, is the only instance in which, even in a case of circumstantial evidence, it was allowed.

In *State v. Jackson* (*supra*), the prisoner was indicted "for feloniously assaulting and shooting one Jonathan Mills with intent to kill him." The testimony showed that the deceased did not assault, or attempt to assault the prisoner. The prisoner, at a distance of thirty yards from the deceased, shot him, the latter being unarmed. The court excluded the evidence. The supreme court sustained this ruling. RYLAND, J., in the opinion, said: "As to the character of the man shot (that is, Mills) for danger and desperation, it was properly excluded from the jury. There may be cases where the general character would be proper evidence before the jury; it would explain the situation of the parties, and their acts and deeds at the time."

In *Oliver v. State* (*supra*), the prisoner was indicted for the murder of one William E. Hammond. The court held, "that whether the circumstances are such as to create a reasonable belief, in the mind of the slayer, that a necessity exists for taking the life of another, is a question for the jury, in solution of which they may consider the condition of both parties."

In *State v. Hawley* (4 *Harr.*, 562), BOOTH, Ch. J., says: "the testimony offered is the general character of the deceased as a violent man. From the fact that we cannot find any case in the books where this evidence has been admitted, nor any

The People v. Lamb.

principle which would admit it, we feel constrained to reject the evidence. We do not see how the character of the deceased as a quarrelsome or fighting man is in issue. The question is guilty or not guilty of murder. The homicide being made out, it lies on the defendant to reduce the offense below the grade of murder, and he must do this by evidence of facts, and not by the mere general bad character of the deceased."

Commonwealth v. Hilliard (2 *Gray*, 294), was a trial before Chief Justice SHAW, and Judges METCALF and BIGELOW. On the trial of the defendant for murder, there was evidence tending to prove an assault by the deceased upon the defendant immediately before the striking of the mortal blow; and the defendant offered in evidence that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of years and strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had remarkable cause to fear great bodily harm.

Clifford, objecting, cited York's case (7 *Law Rep.*, 507, 509).

"*By the Court.*—The evidence is inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the Commonwealth to show that the deceased was of mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ*, and the evidence must be confined to the facts and circumstances attending the assault by the defendant upon the defendant."

In York's case, the counsel for the prisoner asked to introduce evidence to the effect that deceased was a man of notoriously quarrelsome and fighting habits, and boasted of his powers as a fighter. This was objected to as irrelevant, and the court sustained the objection. Chief Justice SHAW, in pronouncing the opinion of the court, said: "The rule unquestionably is, that the general character of neither party can be shown in evidence on trials for homicide. The prisoner has the personal privilege of showing his good character, but unless he puts it in issue, it is not so. The government cannot prove either quarrelsome habits in the prisoner, or peaceable habits in the deceased. There is no limit if we go beyond the *res gestæ*. * * * The cases from

Hawks, and from Stewart and Porter, stand alone, and are not of such authority as to require us to leave the established course of practice.

See also *Cowen & Hill's Notes to Phillips on Evidence*, 764, note 205.

I think these cases abundantly and satisfactorily show the ruling upon the trial in this case, excluding the testimony offered, was correct. Indeed, I have not met with a case where such evidence was offered and insisted on, when it did not distinctly appear, that the deceased had assaulted the prisoner, and when that fact thus appeared, then the evidence is admitted upon the principle that it tends to rebut the presumption of malice, or that the killing was in self-defense, or under the reasonable apprehension of great bodily harm. But on the facts proven in this case, the principle contended for has no application. There was no error in the statement of the judge to the jury, that the law presumes malice from the mere act of killing, because the natural and probable consequence of any deliberate act, is presumed to have been intended by the author. The judge had just read the statutory definitions of murder, and the law implies malice where the killing is premeditated or deliberated. The jury could not have been misled by this remark of the judge. It is claimed also on behalf of the prisoner, that the court erred in its charge when he said to the jury: "It is not his impressions alone—but the question is, whether those impressions, at the time he formed them, were correct. If they were correct it is a protection; if they were incorrect, then it affords him no immunity or protection." It is well to see in what connection this language was used. The judge immediately preceding, and in this connection had said: "the other principle of the law is, that a man is not bound if his life is in imminent peril or danger, to await until he recovers a fatal wound or has some great bodily injury inflicted on him. If he thinks his life is in imminent peril, he has a right to act upon that thought and take life; but if he does it, gentlemen, it is at the risk of a jury saying, when all the facts are developed before them, whether he was justified in forming that opinion or not. If you are satisfied from the evidence, that the circumstances did not warrant the conclusion he arrived at, and that he took life, it was no justification, and you have a right to con-

The People v. Lamb.

vict." Then follows the sentences objected to, already quoted. It is seen on examination of them that they are only amplifications or illustrations of the previous remark. He had already told them that the justification did not consist in the fact that he concluded that his life was in danger, but that the jury must be satisfied that he was justified in forming that conclusion from the facts before him; and he therefore, in further illustration, told them that impressions alone were not a justification, but those impressions must have facts for their basis—such facts as would warrant or authorize him in forming or entertaining these impressions; in other words, the impression must be correct. If the impression *alone* of the criminal that his life was in danger, when such impressions are not reasonable and have no facts for a foundation is an excuse for taking life, it is not difficult to see that every prisoner will have such an impression; if that *alone* is an immunity, it will be easy in all cases to be availed of.

This portion of the charge is in conformity with the rules as laid down by BRONSON, J., in this court, in the case of *Shorter v. The People* (2 *N. Y.* [2 *Comst.*], 193). The prisoner in that case was indicted and convicted of the crime of murder. In that case the deceased gave the first blow. The deceased had no weapon, and struck with his naked hand. The prisoner had a knife, with which he inflicted one or more mortal wounds; and Judge BRONSON truly said, "Where a man is struck with a naked hand, and has no reason to apprehend a design to do him any great bodily harm, he must not return the blow with a dangerous weapon. After a conflict has commenced, he must quit it, if he can do so in safety, before he kills his adversary; and I hardly need add, that if his adversary try to escape, he must not persevere and give him fatal blows with a deadly weapon." But upon the precise point now under consideration, Judge BRONSON says: "Where one who is without fault himself is attacked by another in such manner as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearance, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justified, although

The People v. Lamb.

it may afterwards turn out that the appearances were false, and there was, in fact, neither design to do him serious injury, nor danger that it would be done. *He must decide* at his peril upon the fact of the circumstances in which he is placed; for that is a matter which will be subject to judicial review. * * *

And again, he says: "It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

In the view of the facts proven on the trial of this case, the charge of the judge was far more favorable to the prisoner, than the doctrine enunciated by this court in Shorter's case would warrant. Here the judge told the jury, that the impressions alone were not sufficient. In Shorter's case we said it was not enough, that the party even believed he was in danger. His justification must turn upon this, were the facts and circumstances such, that the jury could say, he had reasonable grounds for his belief. He must decide at his peril, upon the force of the circumstances in which he is placed, for his decision must be subject to judicial review. The judge therefore committed no errors, in this portion of his charge, and if the charge now criticized was subject to exception, everything objectionable in it was removed by the judge charging as requested in the third proposition of defendant's counsel. He certainly then explained what he understood by the language.

Notwithstanding my opinion that no injustice has been done to the prisoner by any of the rulings upon his trial, I nevertheless concur with my brethren, that under the peculiar circumstances of this case, and in view of the provisions of the special statute applicable to appeals, in capital cases tried in the New York general sessions of the peace (*Laws of 1855*, 613, § 3), the prisoner should have another trial.

SMITH, J.—The testimony in this case, carefully considered, does not, in any view, warrant the defendant's assumption, that the killing of his wife was justifiable as a lawful and necessary act of self-defence. To maintain such claims, it was essential to show, (1) that the defendant himself was acting in no wise against law in the encounter which resulted in the homicide; (2) that at the time of giving the fatal blow he had

The People v. Lamb.

reasonable ground to apprehend a design to him of some great personal injury ; and (3) that he also had reasonable ground to believe, that there was imminent danger of such a design being accomplished (2 *Rev. Stat.*, 680, § 3, subd., 2 ; The People v. Shorter, 2 *N. Y.* [2 *Comst.*], 193 ; The People v. Sullivan, 7 *N. Y.* [3 *Seld.*], 396).

The defence in each of these particulars, according to the testimony of Mary Driscoll, the only witness relied upon by the defendant to prove his plea of self-defense, was that the defendant was the aggressor in the final encounter which terminated in the homicide. His wife had previously hit him on the hand with the poker, and had flung the lid of an iron kettle after him at the door ; he stood near the door some fifteen minutes after the missile was thrown, and then advanced upon his wife and struck her with his fist ; soon after, she pulled his chair from under him, and he then knocked her down with a stick of wood, and, she getting up, they had a scuffle, in which he inflicted the wound of which she died. The deceased had no weapon after she discharged the iron lid : and there were no facts or appearances justifying the belief that she designed to do him a great personal injury ; and that the danger of the accomplishment of such a design was imminent. If he believed she designed to attack him and do him such injury, he had ample opportunity to avoid the attack, and it was his duty to do so. His right of attack for the purpose of defense did not arise until he had done everything in his power to avoid its necessity (People v. Sullivan, *supra*).

The instruction given by the judge to the jury, on the subject of justifiable homicide, was, therefore, an abstract proposition ; even if it was erroneous, it did not prejudice the defendant.

But viewing the portion of the charge relating to that subject as a whole, and not in detached fragments, it is by no means clear that it was erroneous. The judge said a man is not bound, if his life is in imminent peril, to wait till he receives some great bodily injury. If he thinks his life is in imminent peril, he has a right to act upon that thought and take life, but if he does it, it is at the risk of a jury saying when all the facts are developed before them, whether he was justified in forming that opinion or not. If the jury are satisfied,

from the evidence, that the circumstance did not warrant the conclusion that he arrived at, and that he took life, it is no justification, and they have a right to convict. Thus far the charge was quite unexceptionable. The judge said further (and this is what is excepted to), "It is not his impression alone, but the question is whether those impressions, at the time he formed them, were correct." If correct, they are a protection, otherwise not. By fair construction, the term "correct impression," thus used, is to be read in the light of the preceding portion of the charge above cited; and it means simply "impression warranted by the circumstances," under which the defendant acted at the time of the homicide. It would be putting a forced and narrow construction upon the charge, to say that it was intended by the court or understood by the jury to exclude impressions based upon appearances which were afterwards shown to be false.

The fact that there was no evidence in support of the plea that the homicide was justifiable, was also a sufficient ground for rejecting the offer of the defendant's counsel to show that the deceased was of a quarrelsome, vindictive and brutal disposition. The authority cited by the defendant's counsel goes to show that testimony of that nature has been received only in cases where the killing took place under circumstances that afforded the slayer reasonable grounds to believe himself in peril, and then solely for the purpose of illustrating to the jury the motive which actuated him (*Wharton's American Criminal Law*, § 641, 4th ed., do. Homicide, 249, and cases there cited).

When offer was made in this case, the witness Driscoll had not been examined, and after her testimony was given the offer was not renewed.

Besides testimony substantially of the character of that offered was allowed to come in, inadvertently or otherwise, in the course of the trial, so that the defendant was not prejudiced by the rejection of the offer.

But there is another branch of the case in respect to which, I think, the court erred. It became a question upon the evidence, whether the homicide was perpetrated with a premeditated design to effect death, or without such design, and in a heat of passion. If the former hypothesis was a true one, the

The People v. Lamb.

homicide was murder ; if the latter, it is one of the degrees of manslaughter.

If the nature of the homicidal act itself furnished presumptive evidence of a deadly intent, the jury were authorized to find that such presumption was overcome by the testimony of Mary Driscoll, provided they thought her testimony sufficient entitled to credit.

The only evidence of a premeditated design to effect death, aside from the nature of the criminal act itself, was the testimony of Ann Kennedy, that she saw the prisoner at the door, rubbing a knife on a board, and the testimony of the little girl, the daughter of the deceased, that when Lamb approached her mother, just before he stabbed her, he said to her, "I will hang for you."

The daughter was but eight years old at the time of the trial. The witness Ann Kennedy was grossly intoxicated with liquor immediately after the killing, according to the testimony of the policeman O'Day, a witness for the prosecution—so much so, that the jury would have been warranted in saying that she was incapable of appreciating or recollecting what occurred at the time of the homicide.

Neither of these witnesses was corroborated in respect to the foregoing particulars of their testimony.

It appeared by the medical testimony introduced by the prosecution, that the wound was on the left side of the neck, and its depth was about half the length of the blade of the penknife shown in court as the weapon used, and that it entered an artery which none but a physician would be likely to find except by accident.

It was thus very doubtful on the whole evidence whether the crime was of a higher grade than manslaughter.

In this state of the testimony, the defendant gave evidence of his general good character, and it was not contradicted.

It was an important item of evidence, and the defendant was entitled to its full benefit.

The court charged the jury in respect to it as follows: "Good character, as all judges have charged juries, is a shield and protection where it is offered, in doubtful cases, but in a clear case *it affords no protection*. Yet it is for you to say how far and what degree of weight you will give to that testi-

The People v. Lamb.

mony. * * If you think it entitled to any weight, you *can* regard it; if you do not, you *can reject it*." In so far as the charge left it to the discretion of the jury to utterly disregard the uncontradicted evidence of the defendant's good character (and it seems to have done so unqualifiedly), it was erroneous, and prejudicial to the defendant.

The true rule is that such evidence must in any event be considered by the jury, together with the other facts and circumstances of the case; it is not merely of value in doubtful cases, but will of itself sometimes create a doubt, when none could exist without it, and if good character be proved to the satisfaction of the jury, it should turn the scale in favor of the defendant, even in cases where, without it, the whole evidence would slightly preponderate against him (*Stephens v. The People*, 4 *Park. Cr.*, 396; *Cancemi v. The People*, 16 *N. Y.*, 501; 2 *Russ. on Crimes*, 785-86).

This inaccurate instruction was the more damaging to the defendant in consequence of some other features of the charge, relating to the question whether the crime proved was murder or manslaughter.

The judge read the statutes defining these offences, and then said: "You perceive, gentlemen, that our law has made provision for almost every circumstance connected with homicide, reducing it down, and, in point of fact, leaving it purely to the decision of the jury, where there are doubts." At the close of the charge, the counsel for the defendant, evidently apprehensive that this language would be understood by the jury as an intimation that if they were in doubt as to the grade of the offense proved, they could convict of either in their discretion, asked the court to charge "that if the jury have a reasonable doubt, from the evidence, as to what degree of guilt to convict, it is their duty to convict of the lesser degree." In reply, the court said to the jury, "that is a matter purely for your determination. If you are not satisfied that he intended the act, as I said before, you can find him guilty of either of the lesser degrees." Now, the rule which the defendant's counsel asked to have submitted to the jury was strictly correct, and applicable to the evidence in this case (3 *Gray*, 463-66; *Wharton's Am. Cr. Law*, § 710, 5 ed.). It would perhaps be hypercritical to say that the charge was not intended to comply with the request,

The People v. Lamb.

but it certainly lacked that degree of clearness and precision with which it is desirable that controlling rules of law should be laid down to the jury, especially in capital cases.

Again, the judge charged the jury that the law presumes malice from the mere act of killing. The proposition is true in the abstract, and is strictly applicable to the case where the killing is proved to have been done by the defendant, *and nothing further is shown*; that where circumstances of accident, of necessity, or infirmity appears, all the evidence which the jury find true is to be considered, and no excuse or justification being shown, if the jury are satisfied beyond a reasonable doubt that the homicide was perpetrated with malice, it is their duty to return a verdict of murder, otherwise of manslaughter. In this case the rule was stated without its qualification.

Lastly, the testimony of the little girl, and that of Ann Kennedy, although admissible, were to be received with very great caution, owing to the circumstances above adverted to, yet their statements were distinctively presented by the court to the jury as evidence to be considered, in determining whether the defendant acted with a premeditated design to effect death; but no instruction was given as to the unusual degree of caution with which the testimony should be scrutinized and weighed.

These several features of the charge, although, perhaps, not amounting to errors for which a new trial would be granted in ordinary cases, were unfortunately calculated to confirm the wrong impression which the erroneous ruling in respect to the evidence of good character inevitably produced in the minds of the jury. Under the provisions of the special statutes, which give us a peculiar jurisdiction in this case (*Laws of 1855*, p. 613, c. 527, § 3), I think the defendant is entitled to a new trial.

I am therefore of opinion that the judgment of the supreme court, setting aside the conviction, and ordering a new trial, should be affirmed, and that the record, with the judgment of this court, should be submitted to the court of general sessions of the city and county of New York, to proceed therein.

*2d
3d
Superior 244*

O'REILY *against* THE MUTUAL LIFE INSURANCE COMPANY.

New York Superior Court; Special Term, November, 1866.

PLEADING.—ACTION TO REINSTATE CONTRACT OF INSURANCE, AND RESTORE TO MEMBERSHIP IN THE COMPANY.—EFFECT OF WAR UPON CONTRACTS.

An action will not lie to declare an executory contract, which is contingent upon performance on the part of the plaintiff, to be valid and subsisting, where no relief can be given as to the substance of the contract.

An action will not lie to reinstate a member of a mutual insurance company, whose policy the company have declared forfeited for non-payment of premiums. So far as rights of membership are concerned, the proper remedy is mandamus.

The relation between a mutual insurance company and its members does not permit a relaxation, between them, of the rule requiring strict performance of conditions precedent.

What amounts to an allegation in pleading, of impossibility, to excuse non-payment.

A mere state of war between the two communities in which the parties to a contract respectively resided, and the consequent inhibition of commercial relations, do not form an excuse for the non-performance of a condition precedent so as to avoid a forfeiture of the contract.

Demurrer to complaint.

This action was brought by James O'Reily against the Mutual Life Insurance Company of New York.

The relief demanded in the complaint was that a certain policy of insurance upon the life of the plaintiff, executed by the defendants, may be declared valid and binding upon them, and that he may be reinstated in his rights in respect thereto, or that a new policy may be executed by them, and further or other relief.

The complaint sets forth the incorporation of the defendants, and the execution and delivery by them in the year 1848 (on the 20th day of April), to the plaintiff, of the policy of insurance in question, of which a copy was annexed. By such policy, the

O'Reily v. The Mutual Life Insurance Company.

defendants, in consideration of a specified sum—forty-two dollars—paid to them, and of a like sum to be paid every year during its continuance, on or before a certain day (April 20th), agreed to insure the plaintiff's life in a certain sum (\$1,000) and promised to pay such sum, in a certain time (60 days) after his death to his executors, administrators, or assigns, which policy it was declared therein, should be null and void, in case the plaintiff should not pay such annual premiums on or before the days therein mentioned, whereupon all such previous payments should be forfeited to the defendants. It was stipulated that the act of incorporation of the defendants should be considered part of the complaint. The act was passed in 1842 (*Laws of 1842*). By its first section certain named persons, and all others who might thereafter "associate with them in the manner thereafter prescribed," were created "a body politic and corporate." Its second section gave such corporation the power "to insure their respective lives and to make all and every insurance appertaining to or connected with life risks." Its third section made all persons who should thereafter "insure with such corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in such corporation, as therein provided, members thereof during the period they should remain insured by it, and no longer." Persons so becoming members were required by it the first time they effected insurance and before receiving their policy, to pay the rates to be determined by the trustees of such corporation (§ 7); which, as well as the amount to be insured, they were authorized to do (§ 8). The premiums so paid were made liable for all losses and expenses incurred by it, but were forbidden to be withdrawn (§ 7). Such corporation was also thereby authorized to maintain suits at law against its members for any cause relating to its business, and such members were likewise authorized to prosecute suits at law against it, for losses by death at the end of three months after notice to it, thereof (§ 12). The officers of such corporation are therein required, at the end of certain periods, to cause a balance to be struck of its affairs, and "credit each member with an equitable share" of the profits (§ 13). The amount so placed to the credit of a deceased person whose life may have been insured at the last time of striking such balance before his death is required to be paid to the party entitled to receive it

O'Reily v. The Mutual Life Insurance Company.

and the proportion of the amount which would have been due to him at the next striking of a balance, to be paid when ascertained and declared. Such act of incorporation further authorized the trustees to prohibit any member entitled to share in the profits, who should omit to pay any premium or periodical payment due from him to such company, from sharing in its profits, and also declared that all previous payments should go to the benefit of the company.

The complaint also alleged, that the plaintiff has always been a resident of the State of Alabama, and paid to the defendants, through their agent (McCoy), the premiums of insurance coming due on such policy up to and including the year 1860. That the recent rebellion against the government of the United States commenced before the 20th of April, 1861. That "all communication between the parties to this action was at that time suspended, and all payments by the plaintiff to the defendants of premiums in the city of New York rendered impossible," but that the plaintiff continued to pay the same premiums during the four following years (1861, 1862, 1863, and 1864) to the same agent. That the plaintiff, as soon as practicable after the rebellion ended, offered, in the year 1865, to pay the premium due in that year to the defendants, who refused to receive it, claiming that the policy had become forfeited by non-payment of the premiums for the four previous years (1861, 1862, 1863, and 1864). And that the plaintiff tendered, in the year 1866, the amount of premiums for five previous years, with interest from the time when they became due, which the defendants refused.

To this the defendants demurred, assigning for cause; 1. That the court had no jurisdiction of the subject of the action; 2. That the complaint did not state facts sufficient to constitute a cause of action.

B. W. Huntington, and Alexander W. Bradford, in support of the demurrer.

Emerson, Goodrich, & Knowlton, for the plaintiff.

ROBERTSON, Ch. J.—No obligation was imposed upon the plaintiff by the terms of the policy in question. It bound the

O'Reily v. The Mutual Life Insurance Company.

defendants, only, to pay to his representatives a certain sum after his death, upon the performance by him of certain conditions, which were entirely at his option. The only means they had to secure the performance of such conditions was his own sense of self interest in not losing the advantages of their contract. As such conditions consisted mainly of periodical payments of certain sums of money, he was required to relinquish all right to reclaim any money previously paid by him, in case at any time he should neglect to pay those payable subsequently.

The rights of the plaintiff under the policy, and by virtue of his membership of the corporation of the defendants, with the exception of his right to a share of the profits of the latter, and that of his representatives to the payment of the sum insured in case of his death, are so nearly identical, that they must be governed by the same principles. No case is made for claiming such share by alleging profits, the equitable allotment of a share of them to the plaintiff by the trustees of the company under the 13th section of the Charter, or a demand for them and non-payment. Of course, while the plaintiff is alive, any contingent right of his representatives cannot be determined in advance.

I do not see very clearly what, or upon what, this court can adjudicate under these circumstances: I mean make an adjudication; not merely promulgate an opinion. The objection, perhaps, does not rank very precisely as one of those to jurisdiction over the subject of action, but it is rather one to the sufficiency of the cause of action stated. No account can be decreed of profits made by the defendants, for the reasons already stated. The court cannot make a declaration or proclamation of its opinion to the world now, to be of any avail to the plaintiff's representatives in recovering the amount insured hereafter; no transfer or vesting or divesting of rights would ensue for such a declaration, and nothing could now be decreed to be done as a consequence of such a declaration (*Rooke v. Ld. Kensington*, 2 *Kay & J. R.*, 753; *Grove v. Bastard*, 2 *Ph. Ch. Ca.*, 619; *Jenner v. Jenner*, *Law Rep.*, 1 *Eq.*, *Pt. III.*, 361; *Baylies v. Payson*, 5 *Allen*, 488).

Such a judicial declaration appears to be only known to the

O'Reily v. The Mutual Life Insurance Company.

system of jurisprudence peculiar to Scotland (*Bell's Principles, &c.*, § 2252).

If the present complaint were directed to the restoration of any rights of membership in the corporation of the defendants, of which the plaintiff is deprived, this court could give no relief even as a court of equity; since the proper remedy is by mandamus to restore him to such rights, of which the supreme court alone has jurisdiction. So that the only jurisdiction the court could exercise would be to order a repayment, or in other words enable the plaintiff to rescind the contract, and recover back part payments made by him, upon the ground that being part payment of an entire consideration, the defendants have either refused to perform their part of such contract, or thrown such obstacles in the way of the plaintiff's performance of those conditions, which would enable him to claim the advantage of it, as to entitle him to be restored to the condition in which he was before it was made.

Even assuming, however, that the policy was an entire contract to insure for a life time, defeasible on non-payment of the fixed annuity, and that therefore such non-payment was a condition subsequent, and entitled to greater favor than a condition precedent, and that the present is a case for relaxing the rigors of the law in regard to performing such condition, the policy and its acceptance constituted something more than a contract. They conferred a membership of the corporation of the defendants, and gave the plaintiff a right to a share of the profits of the defendants, including such very payments.

The defendants were a partnership, whose business it was to receive compensation for entering into contingent obligations, which either formed the capital by means of which such obligations were to be discharged, or profits to the partners, in case they exceeded the amount necessary to discharge such obligations. The plaintiff, by becoming a member, was adopted as a partner in an existing partnership, agreeing to contribute to its capital the sums necessary to entitle him to a continuance of the contract which made him a member, which at the same time formed the consideration for such continuance, he receiving back as a member of such partnership while he so continued to contribute, a share of the very sums so contributed by him as profits. But he also agreed that a failure to

O'Reily v. The Mutual Life Insurance Company.

continue such contributions should deprive him of his membership, and all right to reclaim, as an individual with whom the partnership has made an unfulfilled contract, the sums paid as a consideration therefor. It is manifest that such a relation stands on an entirely different footing, as to the relaxation of the strict performance of conditions, from that of a mere obligor or obligee. The whole business for which the partnership was formed must end, if every one availed himself of obstacles to a performance on his part, to insist on the continuance of the contract. As it was entirely a matter of option with the insured to continue the contract of the company, the latter could not know why he had failed to perform the condition, by whose performance they were to be notified of such election, and would be at a loss, in entering into new and similar obligations, to know on what to rely for the means of discharging them. This would be so entirely subversive of the purposes, mode of operation, and vitality of such a partnership, that such a relaxation of the rule would defeat the whole value of the contract and could not be supposed to have entered into the contemplation of the parties to it. The waiver of all right to claim such relaxation in any event, is by implication as much a part of such contract, as if it had been expressly stipulated in it (*Priest v. Citizens' Ins. Co.*, 3 *Allen*, 602; *Buffum v. Fayette Ins. Co.*, 3 *Allen*, 360; *Abbott v. Shawmut Ins. Co.*, 3 *Allen*, 213; *Mulrey v. Shawmut Ins. Co.*, 4 *Allen*, 116; *Brewer v. Chelsea Ins. Co.*, 14 *Gray*, 203; *Evans v. Trimountain Ins. Co.*, 9 *Allen*, 329; *Treadway v. Hamilton Ins. Co.*, 29 *Conn.*, 68; *Baxter v. Chelsea Ins. Co.*, 1 *Allen*, 294; *Nightingale v. State Mutual Ins. Co.*, 5 *Rhode Island*, 38; 11 *Cushing*, 265; 12 *Cushing*, 469; 8 *Gray*, 28; 7 *Cushing*, 38).

But assuming this policy to be a mere contract between strangers to each other, and that this court could make a decree or judgment available and binding on the parties, and that unexpected obstacles, difficult to overcome, were an excuse for the want of strict performance of the condition subsequent contained in such policy, the question still remains whether the existing state of war between the government of this country and the insurgents, Confederate States, as they termed themselves, was a justifiable excuse for the non-payment of the premiums in question. Such an excuse has two aspects; first,

O'Reily v. The Mutual Life Insurance Company.

the physical impossibility of paying such sums, by reason of the difficulty of communication between the two parts of the country; and secondly, the prohibition of any dealings, by the inhabitants of the loyal States with the rebels or those inhabiting the country over which their dominion extended. I do not think the complaint undertakes to allege that the payment of such sums was physically impossible. Its allegations are merely that "communication was suspended," a very indefinite phrase, and "that all payments of premiumns were impossible." It does not state how or why they were impossible, whether the plaintiff ever possessed the means to pay, or desired to pay, or whether he made any effort. Possibility too often depends upon the will, the means, and the effort to accomplish an end, for the court judicially to know that there were insurmountable obstacles to a payment, without which it is not to be considered legally impossible (*Beebe v. Johnson*, 19 *Wend.*, 500).

The history of the war shows, that however difficult and circuitous the mode was, such payments were feasible. I apprehend the plaintiff is not at liberty to substitute his own conclusion as to an impossibility, for a statement of the facts which he considered as producing it, that would enable the court to judge of the impossibility. A mere state of war does not necessarily produce it physically, and can only do so when such is its legal effect.

It is, perhaps, not entirely free from difficulties, how far the performance of conditions subsequent, by an obligee, to prevent a contract from being forfeited or rescinded, during a state of war, between the government of such obligee and that of the obligor in the country of the latter, is lawful. Of course no action can be maintained during a state of war by an alien enemy, nor while it subsists can any valid commercial contracts be made between the subjects of hostile powers (*Griswold v. Waddington*, 16 *Johns.*, 438; *Monongahela Ins. Co. v. Chester*, 43 *Penn.*, 491).

But contracts made before, can be enforced after such war, which only suspends the right of action, has ended. It has been held, that it was not unlawful for a citizen of the United States within its territory to perform, during a war with a foreign power, an act in pursuance of a contract made before

O'Reily v. The Mutual Life Insurance Company.

such war, for the benefit of a subject of such foreign government (Buchanan v. Curry, 19 Johns., 137). How far this would extend to the acts of an alien enemy or his agent within the United States, to prevent a contract for his benefit with citizens of the United States from lapsing, is perhaps open to discussion. Or although such alien enemy might not be allowed to perform such acts during such war, perhaps a neutral merely domiciled in the country of the enemy might; although his goods equally with those of an alien enemy are liable to capture and condemnation by the adverse belligerent (Elbers v. United Ins. Co., 16 Johns., 128).

But whatever may be the settled law on the subject, it does not aid the present plaintiff, who must be held, if he were allowed to tender the amount during the war, and was not prevented by invincible necessity from doing so, not to have a sufficient excuse for not doing so; or else if such necessity was created by the illegality of dealings between subjects of belligerent governments during the war between them, he is not entitled to avail himself of a common calamity, which operated equally on both parties. He could not, in the latter case, be placed in a better light than if the legislature of the State had rendered the payment and reception of such premiums illegal, and subsequently repealed such enactment. In such cases both parties are deprived of a right in order to meet a public necessity, and although such *vis major* may excuse the performance of a covenant, it cannot the non-performance of a condition which is to keep alive a contract. It is the State that, in such cases, confiscates for and sacrifices to the public interest, not the other contracting party, who forfeits what would have been the benefits of the contract, if continued. It has been deemed necessary even to provide, by express statute, that the period of the continuance of a war between the United States and a foreign power, should be no part of the time of the statute of limitations, where the plaintiff had been a citizen of the country so at war with the United States (5 Rev. Stat., 295, § 32; Code of Procedure, § 103).

For the several reasons, therefore, that no judgment can be given by the court to affect the rights of the parties; that the partnership of the plaintiff with the defendants was terminated by his non-contribution of capital or profits, contrary to the

Magnus v. Trischet.

terms of the partnership agreement, and there is no equity which entitles him to be restored ; that he has not stated obstacles to the performance of the conditions required of him, so as to enable the court to pass upon their sufficiency, and that a mere state of war between the existing authorities of the country in which he resided and the United States, formed no excuse for not complying with such condition ;

I think judgment should be rendered for the defendants, with the usual leave to plaintiff to amend.

Ordered accordingly.

MAGNUS *against* TRISCHET.

New York Superior Court ; Special Term, December, 1866.

RE-SETTLEMENT OF CASE.—MOTION FOR NEW TRIAL.

A party is not entitled, upon the settlement of a case, to have inserted in it a statement that it contains all the evidence which was given upon the trial, unless the object is, to move for a new trial upon the ground of a misdirection which was not the subject of an exception.

In the New York superior court, a motion for a new trial cannot be made *after* judgment, except upon special cause shown.*

Motion for re-settlement of case, and for a new trial.

This action was brought by Samuel A. Magnus, and others, against Samuel Trischet. After judgment and the settlement of a case, the defendant made two motions—one for re-settlement of case, he insisting upon inserting in the case the following clause ; “the within case contains all the evidence taken on the “trial,” which had been disallowed on the settlement ; the other motion was for a new trial on the case.

* The contrary is held in the supreme court, in the first district (*Lane v. Bailey*, 1 *Abb. Pr.*, N. S., 407).

C. Wehle, for the defendant.

J. Eschwege, for the plaintiff.

ROBERTSON, Ch. J.—Whether the defendant is entitled to have a statement in the case that it contained all the evidence, depends upon whether the object of the case is to move for a new trial upon the ground of a misdirection, which was not the subject of an exception, or of one which was. No exception was taken to the charge of the court, that, “If the jury found that the defendant in his letter had reference to the contract, the two papers taken together constituted a contract signed by both parties. If it was necessary to show that there was no evidence before the court, to which such charge was applicable, the proposed clause would perhaps be material. But it would be necessary also to show there was *prima facie* reason to believe that such charge misled the jury. It is said, however, that some exception was taken to some refusal to charge, which is not before me. Upon the propriety of that exception, it must be assumed that all the evidence bearing upon it was in the case, under the first subdivision of section 264, of the *Code of Procedure*; and the insertion of such a clause is unnecessary. As the case is not before me, I cannot decide whether such required clause was necessary to protect the defendant’s rights.

It was decided by this court, in the case of *Gurney v. Smithson* (7 *Bosw.*, 398), that a motion for a new trial could not be made as a matter of right, after judgment entered, and there is nothing in this case to show any cause for letting the defendant in to make such motion.

The motion for a new trial must therefore be denied; and as the defendant is reduced to his appeal on the exceptions, there is no necessity for inserting the words desired in the case. Both motions are therefore denied with costs.

THE PEOPLE, *ex rel.* BANKS, *against* THE BOARD OF
EDUCATION.*Supreme Court, First District; General Term, June, 1866.*

OFFICER'S APPOINTMENT AND RESIGNATION.—MANDAMUS.

Under the act of 1864, the power both of appointment and removal of principals and vice-principals in the common schools of the city of New York, is vested in the board of education.

The resignation of such an officer is not consummated without an express acceptance, or the appointment of another person in his place.

The court will not, by mandamus, require the board to appoint the person nominated by the trustees.

Appeal from order made by Mr. Justice BARNARD, denying motion for mandamus.

The relators, Edward M. Banks, and others, trustees of schools, &c., citizens of this State, and residents of the 21st ward of the city, and trustees of common schools in that ward, obtained an order to show cause why a mandamus should not issue to compel the defendants, The board of education, to appoint Abner B. Holley, principal teacher of the male department of ward school No. 49, situated in that ward.

The motion was denied on the moving papers, no papers being read or used in opposition.

The facts upon which the application was based, aside from their bearing upon the position and office of the relators, and the organization of the school department and the schools under its charge, were these. (1.) Prior to, and on January 19th, 1866, one William H. Wood was the principal teacher of the male department of ward school No. 49, duly appointed and acting. (2.) On that day, in a communication to the board of trustees of that ward, he resigned the position. The resignation to take effect May 1, 1866. (3.) On the 19th day of February, 1866, the resignation was finally accepted by the board of trustees.

The People *ex rel.* Banks *v.* The Board of Education.

(4.) On the 5th day of March, 1866, at a meeting of the board of trustees, all the members being present, Abner B. Holley was duly nominated for the position to supply the place of Wood as such principal teacher. (5.) The trustees, thereupon, in writing, nominated Holley, to the board of education, for appointment to the place made vacant by the resignation, and duly laid the nomination before the board of education. (6.) On the 2nd of May, 1866, the board of education took up and considered the nomination, and refused to act, upon the ground that Wood had not resigned, and that there was therefore no vacancy.

The mandamus having been denied, the relators appealed.

H. W. Johnson, and *William F. Allen*, for the appellants.—

I. The relators, as trustees, are by law charged with the conduct and management of the schools within the ward, and have a duty to perform in the selection and appointment of teachers, and in their capacity as trustees, may resort to a writ of mandamus, when that is the proper remedy to compel action by others in matters affecting the schools under their charge. As citizens interested in the performance of a duty imposed upon the board of education for the benefit of the public, they are proper actors and relators in this proceeding (*Laws of 1864*, p. 825, § 12; *Id.*, p. 828, § 23; *Laws of 1851*, p. 740, § 10; *Manual Board of Education*, pp. 6, 7, 24, 40; *People v. Collins*, 19 *Wend.*, 56; *Same v. Tracey*, 1 *Den.*, 617; *S. C.*, 1 *How. Pr.*, 186; *Crary's N. Y. Practice*, 284; *Tapping on Mandamus*, 288, 290).

II. The board of education is a body corporate, and as such, performs the duties devolved upon it, and the proceedings were therefore properly taken against it by its corporate name; a proceeding against the individual members of the Board would have been irregular (*Laws of 1851*, p. 735, § 2; *Id.*, 736, § 8; *Manual of Board of Education*, 9, 14; *Tapping on Mandamus*, 315; *People v. Supervisors of Livingston*, 26 *Barb.*, 118; 12 *How. Pr.*, 204).

III. The duty of appointing teachers devolved upon the board of education, and concerns the public, and is ministerial in its character, and performance may be compelled by mandamus; and in case of neglect, there is no other adequate remedy (*Ex parte Goodell*, 14 *Johns.*, 325; *Hull v. Supervisors*

The People *ex rel.* Banks *v.* The Board of Education.

of Oneida county, 19 *Id.*, 259 ; People *v.* Collins, 19 *Wend.*, 56 ; *Ex parte* Heath, 3 *Hill*, 42 ; Achley's case, 4 *Abb. Pr.*, 35 ; People *v.* Tremain, 17 *How. Pr.*, 10).

IV. The fact is undisputed that Wood, the former principal, had resigned, and that there was a vacancy to be filled. There is no pretence that the employment of Wood was for a specific time, and that he could not vacate the position and leave the school at the time indicated in his letter of resignation, and there is no statement in suggestion, that his resignation was not effectual and operative. It was addressed to the proper board—that having charge of the school, and whose duty it was to select and nominate a person to fill the vacancy. But whether this is so or not, the vacancy was caused by the actual surrender of the employment, without a formal resignation to any board or body of men. The resignation and surrender of the appointment and employment, was absolute at the time of sending to the trustees, and took effect at the time indicated for that purpose (*Gilbert v. Luce*, 11 *Barb.*, 91 ; *United States v. Wright*, 1 *McLean*, 569 ; People *v.* Porter, 6 *Cal.*, 26 ; *Gates v. Delaware*, 12 *Iowa*, 405).

V. The decision or statement by the board of education that Wood had not resigned his position, is not evidence upon that subject. The fact of resignation is a matter *in pais* to be proved or disproved by competent evidence. It is alleged by the relators on oath, and is not controverted.

VI. It was the duty of the board of education to appoint Holley, the nominee of the relators. The right and duty of nomination is by law, vested in the trustees. They are bound by law to make nominations for principal teachers of the ward schools, whenever a vacancy occurs, and the board of education are required to appoint on their nomination, and can appoint no other (*Laws of 1864*, p. 825, § 12). The board of education act ministerially and not judicially in the premises. They have no discretion. It is quite likely that the court would not compel the board to act upon an unworthy nomination, but that cause for not proceeding must be shown. Here the nominee is shown to be abundantly qualified, and, in all respects, a proper person to receive the appointment, and nothing is suggested adverse to this statement. It is not competent for the board of education arbitrarily to refuse to appoint the nominee of the trustees, and

The People *ex rel.* Banks *v.* The Board of Education.

if they do so, they may be compelled to make the appointment (Newburgh Turnpike Company *v.* Miller, 5 *Johns. Ch.*, 101 ; The People *v.* Supervisors of New York, 11 *Abb.*, 121 ; 1 *Kent Com.*, 467 ; Morris *v.* People, 3 *Denio*, 381 ; The King *v.* Archbishop of Canterbury, 15 *Eust.*, 117 ; *Ex parte* Jennings, 6 *Cow.*, 518 ; People *v.* Judges of Superior Court, 5 *Wend.*, 114 ; People *v.* Judges of Dutchess county, 20 *Wend.*, 658).

VII. The board of education was bound to act upon the nomination, and the writ should have gone upon the case made by the relators to put that body in motion.

A. R. Lawrence, Jr., for the respondents.—I. The relators have no standing in court. If Mr. Holly has been unjustly refused the possession of an office to which he is legally entitled, *he* is the proper party to apply to the court for relief.

II. The law gives to Mr. Holly, if legally entitled to the position mentioned in the affidavit of the relator Banks, a remedy by a proceeding to obtain possession of the books and papers attached to such position (People *v.* Allen, 42 *Barb.*, 203). He may also maintain an action against the respondents for the compensation attached to the office in question (Gildersleeve *v.* Board of Education, 17 *Abb.*, 201). If not an officer, this is not a matter of public right, and relators cannot have a mandamus.

III. The affidavit of the relator shows that the respondents have acted upon the alleged nomination of Holly, and have, after investigation, pronounced a judgment on the subject. If their judgment is erroneous it can only be reviewed by *certiorari* (*Laws of 1864*, 825, § 12 ; Le Roy *v.* Mayor, &c., N. Y., 20 *Johns.*, 430 ; *Exp.* Mayor of Albany, 23 *Wend.*, 277 ; Betts *v.* City of Williamsburgh, 15 *Barb.*, 255).

IV. The points above taken show that both Holly and the trustees of the 21st Ward have ample remedies if aggrieved, and that a mandamus is unnecessary to afford either of them redress. Upon familiar principles therefore the writ of mandamus should not be granted (*Exp.* Fireman's Ins. Co., 6 *Hill*, 243 ; Matter of Shipley, 10 *Johns.*, 484 ; People *v.* Supervisors of Chenango, 11 *N. Y.* [1 *Kern.*], 563 ; People *v.* Thompson, 25 *Barb.*, 73).

V. The Court is asked to compel the respondents to appoint

The People *ex rel.* Banks *v.* The Board of Education.

a certain person to the office in question, when the law vests the appointing power in the respondents. In other words, it is asked to control the discretion of the respondents in regard to the principalship of the school in question. Courts never interfere by mandamus to control a discretion vested in inferior tribunals or municipal bodies (*Exp. Nelson*, 1 *Cow.*, 417; *People v. Brooklyn*, 1 *Wend.*, 318; *Exp. Brown*, 5 *Cow.*, 31; *Hutchinson v. Com. of Canal Fund*, 25 *Wend.*, 692; *People v. Supervisors of New York*, 1 *Hill*, 362). The papers presented by the appellant also show that in this case the respondents have exercised their discretion, and have rendered their judgment upon the point in dispute, to wit, the question of vacancy. Besides, the relator asks for too much (*People v. Supervisors*, 10 *Abb.*, 233).

VI. There was no vacancy existing in the principalship of ward school No. 49, at the time the trustees sent the nomination of Mr. Holly to the respondents, or at the time that such nomination was made. (a.) The 12th section of the act of April 25th, 1864, entitled "An act in relation to Common Schools in the city of New York," provides as follows: "§ 12. The schools in the several wards shall be classified as grammar, primary and evening schools, and teachers for the said schools shall be appointed as follows: principals and vice-principals by the board of education, upon the written nomination of a majority of the trustees of the ward, stating that the nomination was agreed to at a meeting of the board of trustees, at which a majority of the whole number in office were present. Other teachers, and also janitors, shall be appointed by a majority of the trustees for the ward at a meeting of the board of trustees. Any teacher may be removed by the board of education upon the recommendation of the city superintendent, or of a majority of the trustees for the ward, or of a majority of the inspectors for the district. The board of trustees for the ward, by the vote of a majority of the whole number of trustees in office, may also remove teachers employed therein other than principals and vice-principals, and may also remove janitors, provided the removal is approved in writing by a majority of the inspectors for the district, and provided further, that any teacher so removed shall have a right to appeal to the board of education, under such rules as it may prescribe, and

The People *ex rel.* Banks *v.* The Board of Education-

the said board shall have power, after hearing the answer of the trustees, to reinstate the teacher" (*Laws of 1864*, p. 825). Now, as the power to appoint and remove principal teachers is vested in the board of education, it follows that the resignation of a principal must be sent to that board, and accepted by them before a vacancy can arise (*People v. Carrique*, 2 *Hill*, 93; *People v. Comptroller*, 20 *Wend.*, 595; *People v. Mayor, &c.*, 5 *Barb.*, 43; *Laimbeer v. Mayor, &c.*, 4 *Sand.*, 109). It is not alleged nor pretended that Wood's resignation was ever sent to the board of education, or was ever received or accepted by them. (b.) Besides, the Revised Statutes provide that the resignations of all public officers other than those officers who are particularly specified in article 4, of chap. 5, of title 6, of part 1, shall be made to the body, officer, or board that appointed them (1 *Rev. Stat.*, 413, 5th ed.). The board of education had the power to appoint principal teachers at the time it is alleged Wood resigned (*Laws of 1864*, *supra*).

VII. The nomination of Mr. Holly, even if properly made, gives him no right to the office of principal teacher of ward school No. 49. Under the statute of 1864, to entitle a party to the office of principal in a ward school, two things must concur: 1st. He must be nominated by the trustees in the manner pointed out by the statute. 2d. He must be appointed by the respondents (*Laws of 1864*, 825, § 12; *See section set out under 6th point*; *White v. Mayor, &c.*, of N. Y., 4 *E. D. Smith*, 563). (a.) The case of *White v. The Mayor, &c.*, of New York, is strongly in point in this connection. In that case it appeared that the Commissioner of Streets and Lamps notified Glover (the incumbent of the office of Superintendent of Streets), that White, the plaintiff, had been appointed to the office in question by him. The commissioner had the power to nominate, and, by and with the consent of the board of aldermen, to appoint to such office. It was held that until the board of aldermen had confirmed White's appointment, Glover still remained in office (4 *E. D. Smith*, 563). The difference between the case of White and this, is one in favor of the respondents here, because the respondents not only have the confirming power, but also the appointing power.

VIII. It is obvious that the power of appointment, which is vested in the board of education by the act of 1864, is one in-

The People *ex rel.* Banks *v.* The Board of Education.

volving the exercise of discretion, and that the power on the part of the trustees to nominate, gives them no right to insist that the board of education shall confirm their nomination. (a.) The elementary rule in the construction of statutes is, that the courts should, from the whole scope and object of the statute, ascertain what the intent of the legislature was in passing the statute (*Mayor, &c. v. Walker*, 4 *E. D. Smith*, 268, *per* INGRAHAM, F. J., delivering the opinion of the court). So, too, the general system of legislation upon the subject-matter of a statute may be taken into view in order to aid the construction of a particular statute relating to the same subject. And a statute should be so construed as to suppress the mischief intended to be remedied (*Fort v. Burch*, 6 *Barb.*, 60, 69, 71; *Jackson v. Collins*, 3 *Cow.*, 89). And whenever the intention of the legislature can be discovered, it should be followed with reason and discretion, though such construction may seem contrary to the letter of the statute (*Jackson v. Collins*, 3 *Cow.*, 89; *People v. Utica Insurance Company*, 15 *Johns.*, 380; *Margate Pier Company v. Hannan*, 3 *B. & A.*, 266; *Edmonds v. Dick*, 4 *B. & A.*, 212, *per* HOLROYD, J.; *Rice v. Mead*, 22 *How. Pr.*, 449). (b.) Applying the principles above stated to the statute under consideration, we say that the relator's construction of the act of 1864 is erroneous. This is apparent from previous legislation upon the subject, and from the mischief which the act of 1864 was designed to remedy. Prior to the act of 1864, the power to employ and remove principal teachers was vested solely in the trustees (*Laws of 1851*, 740, 741; *Laws of 1854*, 241). It had been decided in March, 1864, by this court at special term, that under the above statutes the board of education could not interfere in any manner to supersede or set aside the decision of the trustees in the matter of the appointment or removal of teachers (*People v. School Officers*, 18 *Abb. Pr.*, 165; *S. C., sub nom. McHugh v. Board of Education*, 27 *How. Pr.*, 463, *special term by* SUTHERLAND, 1864, *general term, 1864, opinion by* CLERKE, J., BARNARD and LEONARD, JJ., *concurring*). In April, 1864, after the decision of SUTHERLAND, J., the act in question was passed, and the respondents contend that the object and design of the legislature was to confer upon the board of education a supervisory power which would enable them to control the trustees of the various wards. For this purpose they

The People *ex rel.* Banks *v.* The Board of Education.

gave the board of education the power to appoint the principal and vice-principal teachers, leaving to the local boards merely a nominating power, and they gave to the inferior teachers, whom the trustees still have the power to appoint, the right to appeal from any action of the trustees in relation to their removal. In this way the mischief of the statutes of 1851 and 1854 was remedied. The act of 1864 having been passed so closely upon the decision of this court in *McHugh's case*, the conclusion irresistibly follows that it was passed to remedy the mischief or defect which that decision showed existed in the previous acts. (c.) The construction of the relator's counsel frustrates the whole object of the act of 1864. It does not remedy the mischief contained in the acts of 1851, and the amendatory act of 1854. It leaves that mischief still subsisting, because under such construction the board of education become merely the registers of the nominations of the trustees, and the appointment is really made by the trustees. (d.) The error of the relator's counsel consists in looking only at the mere letter of the law. He supposes that the words "shall be appointed," as used in the 12th section, are imperative, and make it incumbent upon the respondents to appoint whomsoever the trustees may nominate. In ordinary cases it is true that the word "shall" imposes an imperative duty when used to define the powers of public officers in a public statute. Where, however, such a construction would defeat the whole object of the act in which the word is contained, as gathered from other parts of the act, such a construction will not be adopted by the courts. (*Cases supra.*)

IX. If the court should, however, be of the opinion that the decision of the court below was incorrect, the respondents ask to have the case remitted to the special term, so that they may read the affidavits prepared in opposition to the motion of the relator, the reading of which was rendered unnecessary by the decision of the court against the relator on the opening of his counsel. This right was reserved to respondents by the order of the special term; and the affidavits will in fact show that Mr. Wood never, in contemplation of law, resigned the position to which Mr. Holly aspires.

BY THE COURT.—CLERKE, J.—I. The act of 1864 declares that principals and vice-principals shall be appointed by the board

The People *ex rel.* Banks *v.* The Board of Education.

of education upon the written nomination of a majority of the trustees of the ward. The actual appointment, then, is vested exclusively in the board of education. It necessarily follows that the power of removal is also vested exclusively in them; for if the trustees were permitted to exercise this latter power, they could at all times nullify the power of appointment given expressly to the board of education. The former could remove as fast as the latter may appoint. If the board of education then have the exclusive power of removal, they alone have the power of deciding when a vacancy has occurred, whether by resignation or otherwise; which includes the power of accepting or not accepting a proposed resignation. Consequently, the tender of resignation by a principal or vice-principal should be directed and delivered to the board of education, who alone have the power of accepting or not accepting it. There was not, in the present case, any resignation by Wood to the board of education, and no acceptance by them of his intended resignation. This is essential to consummate a resignation; until this is done, either by the express acceptance or by the appointment of another in his place, an incumbent is never legally out of office. "Otherwise an unworthy person, guilty of the most flagrant violation of his duty, could, by voluntary action on his part, in many cases escape a trial, and the deserved ignominy of a dismissal" (*The People on the relation of McCune v. The Board of Police*, 26 *Barb.*, 501). No vacancy having actually existed, the board of education were not bound to take any notice of the nomination by the trustees.

II. Even if there was a vacancy, we could not grant this particular application. We are asked to compel the board of education to appoint Abner B. Holly. Why? Merely because he was nominated by the trustees. This would be giving the appointment, instead of the nomination, to the trustees, in direct contravention of the act. Under no circumstances, could we do anything more than compel the board of education to proceed to consider the nomination, and to exercise the discretion which the legislature has vested in them.

We could not interfere with that discretion, and order that the will of the trustees, or our will, should dominate over it.

The order must be affirmed, with costs.

WHEELER *against* RUCKMAN.

New York Superior Court; General Term, December, 1863.

ESTOPPEL.—FORMER ADJUDICATION.—DOCUMENTARY EVIDENCE.—
OFFICERS OF COURT.

The plaintiff in an action on a promissory note is not estopped from asserting his title to the note, by the record of a former unsuccessful suit which he, as the attorney for the payee, instituted in the name of the latter.

If such record be admissible in evidence at all, it is only as tending to show want of title in the present plaintiff; and where the evidence on this point is conflicting, it is a question which must be submitted to the jury.

There are no different rules of estoppel for officers of courts than other persons. They are not personally bound by what they state not under oath, so as to be precluded from subsequently testifying otherwise, particularly as regards third parties, except where the latter, having the right to act on the faith of such statement, have done so, and have been prejudiced thereby. (*Per* ROBERTSON, J.)

Claiming in one action to be owner of the chose in action by virtue of a specified transfer, does not preclude the plaintiff from claiming in a subsequent action for the same cause that he became owner by a prior and different transfer. (*Per* ROBERTSON, J.)

Appeal by the plaintiff from a judgment against him on a verdict.

The action was brought by Clarke B. Wheeler, on a promissory note made by the defendants, Elisha Ruckman and William Lake, and which the plaintiff in his complaint alleged was indorsed by one Russell, the payee, and delivered to the plaintiff in February, 1854.

The making and delivery of the note to Russell, the payee, was admitted by the answer of the defendant, Ruckman. The amount of principal and interest due upon the note was proven to be five hundred and thirty-one dollars and eighty-seven cents.

Among other things the defendant offered to prove that the plaintiff commenced a suit on the same note in the Marine court, in the name of Robert P. Russell, the payee of the note, against Lake and Ruckman.

Wheeler v. Ruckman.

To this evidence the plaintiff objected ; the court overruled the objection, and admitted the return from the Marine court, upon an appeal to the court of common pleas, in the suit of Robert P. Russell, against Lake and Ruckman. The counsel for the plaintiff excepted to such admission.

It appeared from that return that the complaint in that action, which was made in February, 1854, and was signed by Wheeler (the present plaintiff), as attorney for Russell (the plaintiff in that action), set forth the note in suit, alleging it to be the property of Russell ; that the defendants set up among other things, that the sheriff, under an attachment issued at the suit of one Drury against the property of Russell, had attached the note, in Wheeler's hands ; and that the justice of the Marine court had dismissed the action, on the ground that the sheriff was a necessary party.

The return having been read, Wheeler offered to show that the reason why he brought such suit in the name of Russell, the payee, was, that he believed the note was not negotiable, and must, without a formal assignment other than the indorsement, be sued in the payee's name. This evidence the court excluded.

It appeared also, that in another former action, brought on this note, by Wheeler in his own name, in this court, and which had been dismissed, he had alleged in his complaint that Russell had assigned the note to him by an instrument under seal, dated in December, 1854.

The testimony being closed, the court, without any summing up of the cause by the respective counsel, instructed the jury directly, and in express terms, to find a verdict for the defendants, which they did, according to the instruction, without leaving their seats.

To these instructions, and to the ruling of the justice before whom this cause was tried, the counsel for the plaintiff excepted ; judgment was entered upon the verdict ; and from the judgment the plaintiff now appealed.

Peter Y. Cutler, for appellant.

E. A. Doolittle, for respondent ;—As to the conclusive effect of the proceedings in the Marine court, cited 3 *Abbott's Digest*, 185, No. 6, 11, 12 ; *Burckhead v. Brown*, 5 *Sand.*,

Wheeler v. Ruckman.

134; *Miller v. Manrice*, 6 *Hill*, 114; 1 *Vern.*, 310; 2 *Ed.*, 461; *Doty v. Brown*, 4 *N. Y.* [4 *Comst.*], 71; *White v. Coatsworth*, 6 *N. Y.* [2 *Seld.*], 137; *Castle v. Noyes*, 14 *N. Y.* [4 *Kern.*], 329; *Ogsbury v. La Farge*, 2 *N. Y.* [2 *Comst.*], 113; *Perine v. Dunn*, 4 *Johns. Ch.*, 140; *Holmes v. Remsen*, 7 *Johns. Ch.*, 286; 3 *Abbott's Digest*, 192, *Nos.* 87, 88, 89 and 121; 1 *Esp.*, 43; 2 *Johns.*, 24; 3 *Abbott's Digest*, 185, *Nos.* 8, 10; 3 *N. Y.* [3 *Comst.*], 511; 12 *Barb.*, 168; *Ehle v. Bingham*, 7 *Barb.*, 494).

BY THE COURT.—MONCRIEF, J.—It is not clear upon what theory, the record of the proceedings and judgment in the Marine court, in the case of Russell against Lake and Ruckman, was presented or admitted as evidence upon the trial. If it is assumed to be upon the ground, as argued by the learned counsel for the respondent, that such record was an estoppel upon the plaintiff in this action, then the ruling of the court is plainly erroneous (*Wilson v. Duval*, 5 *Bosw.*). It was not an action between the same parties, and the plaintiff was not shown connected with it, otherwise than as the attorney for Mr. Russell; and that fact surely could not conclude him in an action like the present, wherein he claims as owner, and adverse of course to Mr. Russell, his former client. The most that could be claimed, is that evidence might have been introduced, tending to show want of title to the note in suit in the plaintiff, by proving his assertion in writing or otherwise, of such title and ownership in Mr. Russell or some other person; but even then, the evidence being conflicting, it would have been the privilege of the plaintiff to have the jury pass upon the questions of fact, under proper instructions from the court.

As a new trial is inevitable, and many of the exceptions now argued may not again be taken, we forbear to notice them.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

ROBERTSON, J.—It may be a matter of considerable question in this action, whether a mere return made and signed by a justice of the marine court of this city, to the court of common pleas of the city and county of New York, upon an appeal taken to the latter court, from a judgment in an action in the former,

was evidence of everything stated in it, particularly in another action where the parties were not the same. It is highly doubtful, if nothing more, whether the mere notes taken by the judge of a court on the trial of a cause, of testimony given by a witness in it, were admissible as evidence of such testimony, except upon proof that such judge does not recollect the words of the witness without such notes (*Russell v. The Hudson River Railroad Company*, 16 *N. Y.*, 134), and that such notes contain his words (*Wilbur v. Selden*, 7 *Cow.*, 162, 165).

If, however, such return and notes had been admitted without objection, it would have appeared by the former, that the judgment of the marine court in the case of *Russell* against the defendant *Ruckman*, was rendered upon the ground that the sheriff alone had a right to maintain the action by virtue of the attachment in favor of *Drury*, and that no evidence was offered of any ownership by the present plaintiff. It also appears, by the judgment of the court of common pleas, that such judgment in the marine court was reversed, and there is no evidence that any further proceedings were had in such action. Of course there is no judgment determining any question of fact estopping the plaintiff from claiming the amount due on the contract sued upon in this action.

There is no evidence in the case, that the present plaintiff was examined as a witness in the marine court action. It does not appear from the case, on what ground this court on the trial of this action, prevented the plaintiff from showing the cause of his filing a complaint in the former court stating that the note there sued upon belonged to the plaintiff in that action (*Russell*) instead of himself. The cause, as assigned in his offer, was a reasonable one to be passed upon by the jury. If the ground was, as suggested on the argument, that the plaintiff having been an officer of the marine court, when he stated in a complaint put in by him as such officer, in that court, that the note then sued upon was at that time the property of the plaintiff in the action then brought, he cannot now be allowed to prove in this court that it was his own, it is clearly untenable. There are no different rules of estoppel for officers of courts than other persons; their statements not under oath are entitled to as much or as little weight as evidence, as those of any other person under the same circumstances; but they are not precluded from testi-

Wheeler v. Ruckman.

fyng to a fact differently from a former statement. They are not personally bound by what they state in pleadings, particularly as regards third parties, unless the latter had a right to act on the faith of such statement, has so acted, and been prejudiced thereby. The defendants in this action not only did not act on the faith of the truth of the allegation in such pleading that Russell was owner, since they even denied it in such action, but they were not prejudiced thereby, for the judgment proceeded on a different ground. They therefore cannot avail themselves of any such assertion. Their own denial of Russell's ownership in such action would be as good a ground for estopping them from now setting it up. Possibly an assertion by the present plaintiff in such action, although as attorney for another, that the contract in question was the property of the latter, if it was his own, may require explanation. He proposed to give a very natural one, but his offer of testimony was excluded by the court; which clearly was error.

Again, in the former action in this court between the present parties, commenced in March, 1855, it appeared by the complaint that the plaintiff claimed to have become owner of the note in question by a sealed instrument in writing, executed by Russell to him on the 29th of December, 1854. The fact of an attachment served in February previous, in the action of Drury against Russell, was admitted on such trial. The only evidence of the plaintiff's title offered, was an assignment under seal, dated in December, 1854. It appeared by the minutes of the court, that the complaint in such action was dismissed, and by a stipulation that it was so by the court, without any submission to a jury. The plaintiff's counsel offered to prove on the trial that such dismissal was put by the judge by whom it was made, distinctly on the ground that the complaint did not show a title early enough to escape the operation of the attachment, and that it should have claimed a title in February, instead of December, 1854; but he was prevented by the court. The decision of one of the justices of this court (BOSWORTH, Ch. J.), on a motion for a new trial in such action, holds that if the plaintiff could not maintain his action under the instrument of December, 1854, he must fail, and that the judgment on the trial must have been given on that hypothesis, and that a prior agreement in February, 1854, could not be noticed because not mentioned in

Wheeler v. Ruckman.

the complaint. The decision of another judge (HOFFMAN, J.), on a motion to amend in that respect, which was denied, was put on the ground that a trial had been had, and a motion for a new trial denied, and the plaintiff's right to recover after the amendment was doubted. It is thus clear that the plaintiff has been prejudiced by being prevented from proving that the causes of action were not the same in the two actions, to wit, that in one it was for a cause of action assigned in February, and in another in December, 1854, his right of action depending exclusively on the time of assignment. He was also precluded in a measure, from showing that a former action had failed for want of evidence, and that judgment was not given against him on the merits. This, of course, was error, on the trial in this action.

Assuming the doctrine laid down in *Dunlop v. Patterson* (5 Cow., 243), to be unquestionable, that a judge is bound to charge a jury that they must entirely disregard the evidence of a witness who admits that he has contradicted in such evidence what he swore to on a former trial, I cannot perceive how the present was a case for its application. The former complaint only alleges that Russell executed to the plaintiff the assignment of December, 1854, and that the plaintiff was the owner and holder of such note. That is not necessarily contradictory to the present one, which alleges the acquisition of such ownership in the February previous. Such assignment would have passed the title, but for the attachment. The plaintiff did *not* testify on the former trial, that he was *not owner* of the note in question, in February, 1854, or did not become so until December, 1854. He testified, it is true, that he was *owner of part* and *Russell of part*, but he produced the agreement on which he rested that claim, and which he now claims gave him the whole. That agreement may or may not transfer all Russell's interest; it is not so clear as to charge even an attorney with perjury, who swears as a conclusion of law that it does. Russell agreed by it, to receive two hundred and fifty dollars in full for the note, if collected by the present plaintiff, and a less sum in proportion to the amount collected; if nothing was collected, he agreed to lose the note, and all moneys due thereon, and the plaintiff was to lose his costs and expenses. It is not necessary now to decide upon the effect of that agreement, except to

rescue the plaintiff from a charge of inevitable perjury, because he may swear it gives him the whole title, or has relied upon it solely in his statement in the complaint to that effect. Such statement under oath was probably based upon the suggestion in the opinion of the learned judge, who refused to allow the amendment of the complaint on the former action, that "such agreement would raise a plausible case at least, in favor of the plaintiff, if it were properly in the case." The plaintiff was cut off, in this case, from every opportunity of proving how he became the owner of the note before the attachment. Upon what grounds does not appear, unless they were those urged on the argument, which are not tenable. It was matter for the jury to determine, when the statements were not contradictory in themselves, or when evidence was given to explain such contradiction, whether to believe the witness or not. The court clearly had no right to pass upon the question of credibility. The decision in this case may yet turn on the proper construction of the agreement of February, 1854.

It is certainly a matter of very great doubt whether the portions of the case made in the former action, between the present parties, as settled in the handwriting of the present plaintiff, could be read in evidence against him. He had no discretion but to copy it as it was settled, he might undoubtedly leave another to copy it, but the fact of saving that expense or time, will not make him chargeable with admitting the facts stated. But he certainly should have been allowed to prove the circumstances under which he made the writing. A case made for an appeal does not necessarily contain all the evidence, and cannot be used even to discredit a witness (*Neilson v. Columbian Insurance Company*, 1 *Johns.*, 301).

It is not necessary now to pass upon the questions raised, as to the validity of the attachment: they may be reserved for a future trial. The judgment should be reversed for the errors before pointed out, and a new trial had, with costs to abide the event.

Ordered accordingly.

COE *against* SCHULTZ.*Supreme Court, First District; At Chambers, December, 1866.*

ABATEMENT OF NUISANCE.—INJUNCTION.—CONSTITUTIONAL LAW.

The common law right of summarily abating public nuisances is not abolished by the constitutional provisions protecting private property.

Hence, if an act of the plaintiff which is interfered with by the health officers be a public nuisance, he cannot be entitled to an injunction to prevent their interference with it.

The act of 1865, constituting the Metropolitan Board of Health, does not authorize the Board to determine what shall be deemed public nuisances; but leaves that as a jurisdictional question

That act is not unconstitutional as contravening the provisions of the constitution respecting the establishment of inferior local courts; nor as delegating legislative powers.

Motion to continue an injunction.

The facts are sufficiently stated in the opinion of the court.

SUTHERLAND, J.—The defendants, constituting the Metropolitan Board of Health, made an order that the manufacturing of superphosphate of lime, or poudrette, by the plaintiff, at Hunter's Point, within the Metropolitan Sanitary district, created by the act of February 26th, 1866, be forthwith discontinued, until the mode of conducting said manufacture should be so altered as that no odor or fumes could escape into the external air; and further ordered that such order be executed by the Metropolitan Board of Police. A temporary injunction was granted, restraining the execution of said order. The plaintiff in his complaint insists, that the business or manufacturing process, as carried on by him, was in no respect a nuisance. The defendants, in their answer, insist that said business or manufacturing process was a public nuisance, and not only disagreeable, but injurious to life and health. On the

hearing of a motion before me to continue the injunction, many affidavits were read on the part of the defendants. tending to show that the said business or process of manufacturing, was, and has been for some time, a public nuisance, and not only disagreeable and annoying to many persons residing in the neighborhood, and to persons passing and re-passing, but also injurious to public health, and many affidavits on the part of the plaintiff, tending to show that the said business, or process of manufacturing, was not, had not been, and could not be, injurious to life or health. After hearing these affidavits, I at once said, that considering them, and the presumptions in favor of the defendants, as public officers, having a great public duty to perform, I should not feel justified in continuing the injunction, on the ground that the thing or act ordered to be discontinued or altered, as a public nuisance, was not, or could not be, a public nuisance; but the counsel for the plaintiff, urging certain constitutional objections to the act under which the defendants had acted, and to their proceedings under it, as to the pertinency or materiality of which in this particular case I was not then prepared to judge, as to such constitutional objections I not only heard the counsel at large, but permitted him to submit an elaborate written brief. A careful consideration of the case, and of the common law and common law decisions as to nuisances, and of the counsel's brief, has led me to think that having substantially held at the hearing that it appeared that the manufacturing business or process, as carried on by the plaintiff, was and had been, a public nuisance, and injurious to public health, I ought at once to have vacated the temporary injunction, and denied the motion to continue it, without considering the constitutional questions; that is, irrespective of them, unless, indeed, I assume that plaintiff's counsel in taking and urging the points, that the execution of the order would deprive the plaintiff of his property, "without due process of law," intended to go so far as to say, that the State constitution had abolished the common law principle that any subject or citizen has the right of his own motion, summarily to abate a public nuisance; a constitutional construction, so novel and so utterly without any colorable support, that respect for the counsel and his brief forbids the assumption. At common law, a private nuisance was a tort; a public or common nuisance a

criminal offence. At common law, a very concise definition of a public or common nuisance was, that it was a public annoyance; but a more extended definition was, that it was an offence against the public, either by doing a thing which tends to annoying the public, and common against all, or by neglecting to do anything which the common good requires (See *Jacob's Law Dic.*, and 2 *Rolle's Abr.*, 83; *Hawk.*, Book 1, p. 197, § 1). It was a principle of the common law, that any one might abate or remove a public nuisance, without staying to have the thing abated or removed, found to be a nuisance by a jury, or in, or by, any preliminary legal proceeding (*Hawk.*, same book, p. 199, § 12; *James v. Hayward*, *Cro. Car.*, 184; *Hart v. The Mayor, &c.*, of Albany, 9 *Wend.*, 571, 588, 589, 608, and authorities there cited; *Wetmore v. Tracy*, 14 *Wend.*, 250). Of course, any one who undertook, even in good faith, thus summarily to abate a public nuisance of his own motion, by his act showed that he regarded and declared the thing stated to be a nuisance; but he nevertheless took upon himself by his act, the risk of being able to show in a proper action by the party whose interests were injuriously affected, *that the thing stated was a public nuisance*. It seems, however, to have been held, that in a plea justifying such abatement or removal, it was not necessary to show that the defendant *did as little damage as might be* (*Hawk.*, § 12, *before cited*); and thus clearly shows the favor with which the common law regarded this summary process of abating a public nuisance. No one has probably ever suggested that *Magna Charta* interfered with this process of summarily abating a public nuisance. If the abatement involved the deprivation of property, the owner was deprived of his property "by due process of law," if the thing abated *was a public nuisance, for then, the summary process of abatement was authorized by the common law, and any process authorized by law must be due process*. The common law was adopted by our State constitution; and if this summary process of abating a public nuisance was "due process" within the meaning of *Magna Charta*, there is not a room for doubt that it is "due process" within the meaning of our State constitution. It was substantially held to be due process without any trial by jury, in *Hart v. The Mayor, &c.*, of Albany (*supra*).

The temporary injunction in this case, restrains the defend-

ants from interfering with the property, or the manufacturing business of the plaintiff, at Hunter's Point. The defendants have justified, or undertaken to justify, their proceedings as public officers, under the Metropolitan Sanitary act—but, if the business or manufacturing process of the plaintiff, was a public nuisance, how can I, in deciding this motion, disregard the common law right of the defendants as citizens to abate the nuisance? I see no principle upon which I can (see Denning v. Room, 6 *Wend.*, 651, 655). If the Metropolitan Sanitary act is constitutional, it did not abolish or impair the common law right, or remedy (*Wetmore v. Tracy*, 14 *Wend.*, 250, 254), and and if it is unconstitutional and void it could not.

Hence my conclusion, that having determined at the hearing that an injunction ought not to be continued on the ground that the business or manufacturing process of the plaintiff was not a nuisance, I might have decided the motion, without considering the constitutional objections urged by the plaintiff's counsel,—but in view of any possible doubt as to the correctness of this conclusion, or as to the propriety of resting any decision exclusively upon the common law right of the defendants in common with others, as citizens, to abate the nuisance, and considering the great public purpose and importance of the Metropolitan Sanitary act. I will look at the case and briefly examine the constitutional objections, as if the injunction was to be continued unless the defendants were justified as *public officers* under the act.

1st. As to the constitutional objection, that the execution of the order would deprive the plaintiff of his property "without due process of law."

I am not willing to concede that the legislature can create a public nuisance, or a new definition of a public nuisance, unknown to the common law or the common law decisions. I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance, which palpably, according to our present experience or information, is not, and can not be, under any circumstances, a common nuisance, by the common law definition, or common law decisions. I am not willing to concede that the legislature can constitutionally declare or authorize any Sanitary Commission or Board to declare the refining or the use in any way of sugar or vinegar to

be a common nuisance, because the one is sweet, and the other sour, or for any other reason. By such an unlimited power, it is easy to see, that any citizen might be deprived of his property without compensation, and without any colorable pretext *that the public good required such deprivation*. It is not impossible to conceive, that at some future day, there might be a legislator thinking the use of water, in any way, to be a nuisance.

But my construction of the Metropolitan Sanitary act is, that it does not authorize, and was not intended to authorize the board, or any part or member of it, to re-define a nuisance, or common nuisance, or to declare an act or thing to be a common nuisance, which clearly under any circumstances is not or can not be such, at common law. Notwithstanding the evidently labored effort by section 14, and other parts of the act, to give the board full and complete power to remove, abate, suspend, alter, improve, and purify, anything dangerous to life or health, as a public nuisance, yet my construction of the act is, that the question whether the thing, which has been or is to be removed, abated, &c., was, or is dangerous to life or health, or was, or is a public nuisance, *is a jurisdictional question*; but of course, independent of the special provision in the act to this effect, considering, that the act not only gives power, but imposes a great public duty, on such a question all presumptions are, and should be, in favor of the board. This appears to have been Justice INGRAHAM's construction of the act, in *Mayor, &c., of New York v. The Board of Health*. One part of the opinion of Judge DALY in *Cooper v. Schultz* goes to show that it was his construction.

This being the construction of the act, conceding for the purpose of answering this constitutional objection, that the execution of the order of the board in question, might, or would, deprive the plaintiff of his property, yet it is clear that it cannot be said that the plaintiff would thereby be deprived of his property "without due process of law," *if the business or manufacturing process of the plaintiff was a public nuisance*, for it can not be doubted, that the legislature had the power to give the board the right to do, and to make it their duty to do the same thing, which any citizen might do of his own motion.

The history of the health laws relating to this city from 1794 to the passage of the Metropolitan act, shows that the legisla-

Coe v. Schultz.

ture have, from time to time, exercised this power, and I suppose the charter of a municipal corporation carries with it the power and the *duty* of protecting the life and health of the inhabitants of the municipality from nuisances. If then the summary abatement of a public nuisance, involving the deprivation of property, by a citizen, of his own motion and without a preliminary trial by jury, at common law, was "due process of law," then the execution of the order of the board in question, would be "due process of law" though its execution might deprive the plaintiff of his property, without compensation.

2. As to the constitutional objection, that the act establishes an inferior local court, within the prohibition implied by article 6 of the constitution.

In the first place, though the powers conferred by the act are unquestionably mainly judicial, yet I do not think that the board can properly be called a court—but if otherwise, there are two decisions of the court of appeals, which prevent me from sustaining the objection. The one is, the Metropolitan Police decision (*People v. Draper*, 15 *N. Y.*, 532), and the other is *Sill v. The Village of Corning* (15 *N. Y.*, 297). The first shows that the legislature had the power to create this new political or governmental district, called the Metropolitan Sanitary district, and to provide for the *appointment* of its officers; the second shows, that this district not being a city, though including *more than one city*, the legislature had the power to provide for the organization of an inferior local court in it.

3. As to the constitutional objection, that the act authorizes the board to pass laws.

It is plain that the by-laws and ordinances which the board is authorized by the act to pass, are not laws within the meaning of the cases holding that the legislature cannot delegate its legislative trust—that they are not *such* laws, any more than the by-laws of any corporation. In fact, the act, without using express words of incorporation, by the powers and capacities conferred, especially the power to make by-laws, creates the board a body politic, or corporate, and if the legislature had power to create the sanitary district and the sanitary board, I cannot see why the legislature had not the power to give the

board the right to pass by-laws, and all proper ordinances to carry out the purpose of such creation.

In fine, I think it follows from the *Metropolitan Police decision*, and the foregoing construction of the Metropolitan sanitary act, that it is constitutional. Of course, that the board might undertake to make by-laws, or pass ordinances not authorized by the act, and outside of the purpose for which the district and the board were created, is a consideration which has no bearing on the questions as to the constitutionality of the act.

The temporary injunction must be vacated, and the motion to continue it, denied, with ten dollars costs.

HAZELTON *against* COLBURN.

New York Superior Court; General Term, November, 1863.

PRESENTATION OF CHECK.—WAIVER OF PRESENTMENT.

Bank checks issued and payable in the city of New York, should be presented during the same or the next succeeding day during the usual banking hours, in order to charge the drawer in case of the insolvency of the bank. A later presentment, except under circumstances excusing the delay, will discharge the drawer.

The fact that the payees of such a check received it as agents of third persons (also doing business in the same city,) and that delay occurred in passing the check to their principals, does not excuse from making presentment within that time.

The drawer's promise to pay a check which has not been seasonably presented, is not binding as a waiver of presentment, unless he was aware or had notice of all the facts as to presentment that would tend to discharge him.

This was an appeal from a judgment taken upon a bill of exceptions.

This action was brought by Frederick, Henry, and John E. Hazelton against Marcus Colburn, to recover the amount of a

check drawn by the defendant upon the Suffolk Bank. The check bore date the 10th of October, 1854; was made payable to the order of Bristow, Morse & Co., and was given for a piano forte sold to the defendant by Bristow, Morse & Co., as agents of the plaintiffs. On the 11th of October Bristow, Morse & Co. delivered the check to the plaintiffs, and it was by them presented for payment to the bank on the 12th, on which day and previous to the presentment, the bank stopped payment.

There was evidence given tending to show a promise by the defendant to pay the check.

The defendant moved to dismiss the complaint on the ground that the check had not been presented in season to charge the drawer, which was refused, and the defendant excepted.

The defendant requested the justice to charge the jury that "a promise made by Colburn subsequent to dishonor, to pay the check, will not bind him, unless he was aware or had notice of all the facts as to presentment, that would tend to discharge him." The court refused so to charge, and the defendant excepted.

The court charged that "a promise made to Bristow, Morse & Co., unless they were agents in that particular matter, was of no more importance than if made to any stranger. But if he (the defendant) made the promise to Hazelton (plaintiff), he is bound by it." To this latter part of the charge, the defendant excepted.

The jury rendered a verdict for the plaintiffs, upon which judgment was entered, and the defendant appealed.

L. A. Fuller, for defendant, appellant.—I. The testimony shows that the check, made and delivered to plaintiffs' agents on the 10th, was not presented for payment till the 12th, which was too late by all the authorities, and discharged the makers (*Little v. Phoenix Bank*, 2 *Hill*, 425; 2 *Greenleaf's Evidence*, sec. 195, a; *Chitty on Bills*, 11 *Am. Ed.* 387, 513, and note 2; *Story's Prom. Notes*, sec. 493, 494, 496; *Smith's Merc. Law*, 3rd *Ed.*, 263, note; *Parson's Merc. Law*, 911; *Byles on Bills*, 15; *Down v. Halling*, 4 *B. & C.*, 330; *Alexander v. Bouchfield*, 1 *Carr & Marsh*, 75; *Manning & Gr.*, 1061; *Maule v. Brown*, 4 *Bing. N. C.*, 266; *East River Bank v. Gedney*, 4 *E. D. Smith*, 584).

Hazelton v. Colburn.

II. The promise of defendant, testified to by F. Hazelton which was relied on to cure this defect, was not shown to have been made with a knowledge of the facts, and therefore did not bind defendant (2 *Greenleaf's Ev.*, sec. 190, note 2; *Myers v. Coleman*, *Anthon's N. P.*, 150; *Griffin v. Goff*, 12 *Johns.*, 423; *Trimble v. Thorne*, 16 *Johns.*, 151; *Crain v. Colwell*, 8 *Johns.*, 299, and note; *Garland v. Salem Bank*, 9 *Mass.*, 408; *Sice v. Cunningham*, 1 *Cowen*, 398, 406; *Jones v. Savage*, 6 *Wend.*, 658; *Tibbetts v. Dowd*, 23 *Wend.*, 378; *Story's Prom. Notes*, sec. 361).

C. M. Sandford, for plaintiff, respondents.—I. The only question in the cause which was submitted to the jury was whether the defendant had promised to pay the plaintiffs, after he knew that the bank had refused payment, and their verdict is conclusive, and is sustained by the evidence.

II. Checks, like inland bills of exchange, payable on demand, must be presented within a reasonable time. What is a reasonable time depends upon the facts (*Chitty on Bills*, 410; *Chitty, Jun., on Bills and Checks*, 26, a; *McCullough's Dic. of Commerce, Title Checks*; *Harker v. Anderson*, 21 *Wend.*, 373; *Chapman v. White*, 2 *Selden*, 417).

III. The holder may, within a reasonable time, put the check into circulation, that is, within the time allowed for presentment; and the transferee will have the same privileges, and the prior parties will not be discharged if the last assignee makes due presentment" (*Chitty, Jun., on Bills and Checks*, 52; *Approved—Harker v. Anderson*, 21 *Wend.*, 387).

IV.—The check was drawn on the afternoon of the 10th, passed to the plaintiff on the 11th, and presented the next morning. This was clearly in good time, according to established rules.

BY THE COURT.*—MONELL, J.—Two questions are presented in this case. 1st. Did the non-presentment of the check until the 12th of October discharge the drawer? and 2nd, was the promise of the defendant to pay the check, a waiver of due presentment and notice?

Bank checks, for all the purposes of presentment and protest,

* Present, BOSWORTH, Ch. J., and WHITE and MONELL, JJ.

Hazelton v. Colburn.

are regarded like inland bills of exchange, payable on demand (Harker v. Anderson, 21 *Wend.*, 373). They must be presented within a reasonable time after delivery to the payee. What is a reasonable time is a question of law, and must depend upon the circumstances of each case (Mohawk Bank v. Broderick, 10 *Wend.*, 304). Very few of the cases have undertaken to define the period which may elapse between the giving and presentment; and probably no general rule can be established. As the circumstances of each case differ, so will the rule differ, and it will be suspended or applied to meet the exigencies or peculiarities of each case. In Beeching v. Cower (1 *Hilt.*, 313), it was decided that a check given and payable in London in the morning, must be presented the next morning, or at farthest during the banking hours of the next day. In Merchants' Bank v. Spicer (6 *Wend.*, 443), the check was given between two and three o'clock P. M., and presented by noon the next day, and it was held seasonable.

Most of the cases in the books arise upon bills, and between indorser and indorsee. In those cases less diligence is required (Mohawk Bank v. Broderick, *supra*).

In the uncertainty in which the books have left this question of reasonable time, I think it may safely be considered that checks issued and payable in this city must be presented during the same or the next succeeding day, during the usual banking hours. A later presentment, except under circumstances excusing the delay, will discharge the drawer (see *Parsons on Bills and Notes*, Vol. 2, p. 72).

The check in question was received by Bristow, Morse & Co., about four o'clock in the afternoon of the tenth of October; on the next day, between three and six P. M., it was delivered by B. M. & Co. to the plaintiffs. It was not presented for payment until the next day, the twelfth; at what hour on that day it was presented, does not appear.

The circumstance that the payees of the check were the agents of the plaintiff, did not authorize them to withhold the presentment; nor would the delay in passing the check to the principals until after banking hours of the next day, excuse the presentment. There was nothing to prevent the presentment on the next day after the check was received, and the holders must be regarded as guilty of *laches* in not doing so. The drawer

Hazelton v. Colburn.

of the check had a much larger sum on deposit with the bank than the amount of the check, and the check would have been paid if it had been presented before the failure of the bank. The plaintiffs must suffer for their own *laches*. The learned judge was therefore right in instructing the jury that the check was not presented within a reasonable time.

2nd. Was the promise of the defendant to pay the check, a waiver of due presentment and notice?

The evidence of the promise is contained in the testimony of F. Hazelton, one of the plaintiffs, who testifies that he saw the defendant the next day after the failure of the bank; that the defendant then knew the bank had stopped payment; that the defendant expressed great confidence that the bank would resume payment, and "assured us that we would get our money, and if the bank did not pay, *he would*."

This evidence was contradicted by the defendant upon his examination; but the judge submitted the question to the jury, who by their verdict have found that the promise was made.

The learned justice refused, in submitting this question to the jury, to charge them, that the promise would not bind the defendant, unless he was aware, or had notice of all the facts, as to presentment, that would tend to discharge him; and charged that the promise to Hazelton would bind him.

It is settled by numerous and uniform decisions, that to make a waiver, however clearly proved, obligatory upon the party making it, it is indispensable that it should be made with full knowledge of all the facts; that is, that there has been a want of due presentment and notice (*Thornton v. Wynn*, 12 *Wheat.*, 183; *Reynolds v. Douglas*, 12 *Pet.*, 497; *Story on Prom. Notes*, § 361; *Tebbetts v. Dowd*, 23 *Wend.*, 379, 411; *Sigerson v. Matthews*, 20 *How.*, 496; 1 *Parsons on Bills and Notes*, 595, where all the cases are collected).

The principle upon which these decisions proceed, is, that these declarations and acts amount to an admission of the party, that the holder has the right to resort to him, and that he has received no damage for want of notice (*Rogers v. Stevens*, 2 *Term R.*, 713).

In this case there is no evidence whatever that the defendant knew, at the time he made the promise, that the check had not been presented until the 12th, two days after it was issued. He

Babcock's Case.

knew the bank had stopped payment, but did not know of the laches of the holder in demanding payment. Even had there been any evidence on that subject, or if knowledge of the bank's failure could be imputed as knowledge that the check had been dishonored, yet the question was one for the jury, and should not have been kept from their consideration.

The learned justice, therefore, in my opinion, erred, both in his refusal to charge as requested, and in his charge, that if the defendant made the promise to Hazelton, he was bound by it, without qualifying the instruction, so that the jury must also find that the promise was made with a knowledge of the plaintiffs' laches.

This is a bill of exceptions, and not a case, and we cannot look into it to see whether the evidence would have been sufficient, nor speculate upon the effect which the instruction, had it been given to the jury, would have had upon their verdict (*Willard v. Warren*, 17 *Wend.*, 257; *People v. Rathbun*, 21 *Id.*, 509).

I am of opinion that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

BOSWORTH, Ch. J., concurred.

BABCOCK'S CASE.

Supreme Court, First District; At Chambers, December, 1866.

BAIL IN CRIMINAL CASES.

Of the right to be admitted to bail in criminal cases.

Where a person is indicted for crime before his arrest, a police justice or a justice of the Supreme Court has no power to let him to bail during the session of the court having jurisdiction to try the indictment.

The Court of Sessions are not authorized, upon such an indictment and arrest thereon, to send the case to a police justice for examination; and an order assuming to do so does not affect the question of power to bail.

The prisoner, William R. Babcock, was arrested on a charge of being concerned in a robbery of Government bonds from Rufus L. Lord. On the 20th of November, 1866, an indict-

Babcock's Case.

ment was found against him in the Court of General Sessions for receiving the bonds, knowing them to be stolen. On the 21st of November, by order of the court, the papers were sent to the police justice for further examination; afterwards the justice refused to take bail, and on the 1st of December the writ in this case was issued, returnable forthwith. This was not a writ of *habeas corpus*, but was a writ commanding the police justice and clerk of the Sessions to certify the cause of the detention of the prisoner for the purpose of considering the question of bail. After this writ was allowed, a commitment of the prisoner, by order of the Court of Sessions, was granted. This application is now made to have the prisoner bailed.

John Graham, for the motion.—I. The statute regulating the writ of *habeas corpus* is peremptory in requiring the court to bail the defendant, "if the case be bailable." This is to be done, *first*, if it appears that the defendant "has been legally committed for any criminal offence;" or *secondly*, if it appears from the testimony offered with the return, or on the hearing thereof, that he is guilty of such an offence, even though his commitment may be irregular. In both these cases the court *must* bail him, if two requisites exist, namely, "if the case be bailable, and good bail be offered" (2 *Rev. Stat.*, 568, § 43).

II. This statute clearly shows that some cases are bailable, as a matter of right. The language is, "if the case be bailable," and not *if the court in its discretion decides it to be bailable*. A case cannot be intrinsically bailable, unless there is some legal scale or standard determining the right to bail, or not.

III. The provision in our State Constitution that "excessive bail shall not be required," also proves that some cases must be bailable, as a matter of right. To hold that the provision is only obligatory after a court decides that a case is bailable, is to defeat the provision altogether. Such a construction makes the right to bail, at all, wholly dependent upon judicial discretion. The Constitution must mean that in all cases bailable as a matter of right, excessive bail shall not be required (*Art. I. State Const.*, sec. 5).

IV. Another provision of the State Constitution forbids the exercise of an *arbitrary discretion* as to admission to bail. It

Babcock's Case.

is this—"nor shall cruel and unusual punishments be inflicted" (sec. 5). What more cruel or unusual punishment than to condemn a man to a hopeless and inactive imprisonment, in advance of his conviction? It is a confinement more intolerable than that inflicted, by way of punishment, after conviction. The very labor, which is a part of the latter, and is designed to increase its terrors, is more endurable than solitude and inaction.

Both these provisions occur for the first time in the Constitution of 1846. They constitute Article 8 of the Amendments of 1789 to the Constitution of the United States. The Federal Constitution, in these particulars, does not apply to or control the States (2 *Story on Const.*, § 1, 1903-4). The principles by which these provisions are to be interpreted, are there stated.

V. It cannot be said that the defendant was taken "with the mainour," or "in flagrante delicto," for although stolen bonds are claimed to have been traced to his possession, it is proved that he told where he got them, and his statement is not falsified. It must be borne in mind that when the defendant was indicted, which was the origin of the accusation against him, the prosecution had no evidence at all upon which to rely as ex-hibitory of guilt. On the examination before Justice Dowling, no circumstance appeared which could in any way implicate the defendant, until certain alleged admissions of his were testified to by Captain Jordan. These were not made, if at all, until after the defendant's arrest. Every circumstance up to that time was calculated to prove the correctness of the defendant's possession of the bonds. He took them to the usual market to be sold, and they were sold and accounted for in the usual way. The transaction literally occurred in "market overt." There was no secrecy or concealment about it. It is strange that, after all this, the defendant should have told Captain Jordan what has been testified to.

VI. If the defendant's alleged admissions show that he is guilty, he is entitled to bail still, under section 43 of the statute. His guilt, before conviction, does not shut off the right to bail, "if the case be bailable." *Admissions*, however, are not sufficient to convict, made under the circumstances of the present. They would stand precisely within the principles enunciated by the court of appeals in *The People v. McMahon* (15

N. T. R., 384), and be discredited by the disturbing influences which must have operated upon the defendant's mind.

VII. At least, it is very extraordinary that the defendant's conduct, before arrest, should exculpate him ; while his tongue, after arrest, should inculpate him.

VIII. If there are no cases bailable as matter of right, and the privilege of bail rests with the court, it must be controlled by a sound, judicial, and not arbitrary discretion. Such a discretion may become as fixed, by reason of precedents or otherwise, as if positively and absolutely fixed by a legislature.

IX. Even if the court has the most arbitrary discretion in the matter, the present application for bail ought to command it in its favor (2 *Hale P. C.*, 125 [1st Am. ed.], note 4).

X. Within the well-settled principles and precedents, the defendant is entitled to bail (2 *Hale P. C.*, 133, 135 ; *Exp. Taylor*, 5 *Cow.*, 39 ; *The People v. Lohman*, 2 *Barb.*, 450).

XI. To withhold this right, when nothing is pretended against the defendant's general character—when he voluntarily returned to this State, on hearing that there was trouble about the bonds he had had in his possession ; when the prosecution do not pretend that bail will not produce his body for trial on the indictment ; when there is not a single reason why he should stand as an exception to the general rule, other than that the prosecution do not want him to be bailed—would be consistent with no previous practice, and no judicial propriety.

XII. If the defendant is assumed to be guilty of a felonious receiving of the bonds in question, there is a doubt as to whether his act amounts to a "legal" crime. The opinion is, to say the least, divided as to whether the statute relative to receivers embraces any other class than those who deal directly with the thief. To receive from a receiver may be a crime, but may not be a "legal" crime (2 *Bishop on Cr. Law*, vol. 2, § 953).

XIII. It is by no means certain that the indictment is good. It charges the reception of property by the defendant, alleged to have been stolen by an unknown thief, when the testimony before Judge DOWLING leaves no doubt that the thieves are perfectly well known, are communicated with by the officers of justice, and yet, for some cause or other, are concealed, or not brought to punishment (*White v. The People*, 32 *N. Y.*, 465).

Babcock's Case.

XIV. It cannot be said that any denial of bail by Justice DOWLING interferes with the defendant's present application to be bailed. The defendant had been indicted in the court of general sessions, and that court, on the motion of defendant's counsel, simply sent the complaint to that magistrate to take evidence, and make a return to the court. He was not to bail, or do more than report his judgment upon the facts to the court.

XV. The commitment of the defendant by the court of general sessions, on the third of this month, without bail, cannot prejudice the present application either. It accrued on the *ex parte* motion of the district attorney, with no notice to the defendant or his counsel to be there to protect his rights. No papers were submitted to the court, and it was a bold exercise of power or authority. (MSS. decision of Judge EDMONDS, holding the *N. Y. Oyer and Terminer*, Dec. 17th, 1849). Not only was the order of the court of sessions tainted with the legal vice of interfering, or seeking to interfere with, or defeat the writ of *habeas corpus*, but the court had no jurisdiction of the body or person of the defendant, and its order was null. There was no plea to the indictment—the defendant was not present—no counsel appeared for him—and the motion for the order was made by the people. (The *People v. Cunningham*, 3 *Park. Cr.*, 531, per CLERKE, J., 542, 543).

XVI. That portion of the return of the warden of the city prison to the writ of *habeas corpus* should be stricken out. It was put in two days after the original return was made and completed, and its matter accrued several days after the issuing of the writ.

XVII. The writ is to be disposed of upon the facts as they existed at the time it was issued, or, at all events, upon the facts existing at the time the original return was made.

XVIII. The right to bail before trial and conviction is, or ought to be, the general rule. Such is believed to be the spirit and design of our government. The United States Judiciary act of 1789 (cited in 2 *Hale P. C.* [1st Am. ed.] 127, note 8), compels the taking of bail by the federal authorities in all criminal cases whatever, except murder, which is subjected to the discretion of those empowered to take bail for such an offence. Many of the State constitutions provide that "All prisoners shall be bailable

“by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great. (*Id.*)

XIX. The defendant should be enlarged upon a reasonable amount of bail. The indictment was found without the least proof as to the *scienter* which is now sought to be made out by confessions wrung from him after arrest; it does stand indifferent whether the defendant is guilty or innocent of the accusation against him (5 *Cow.*, 51); the court “will bail whenever there is any doubt on the law or the fact of the case” (*Id.*, 58), and as there is doubt as to the defendant's guilt, and he may be innocent, he is entitled to bail (5 *Cow.*, 60).

INGRAHAM J., (after stating the facts)—Several questions of importance as to the right of a prisoner to be discharged on bail have been ably argued before me, but the views which I entertain in regard to this application are such as to render the decision of these questions unnecessary in the present case.

1st. The indictment having been found against the prisoner before his arrest, it was unnecessary to have any examination before a magistrate, and it became the duty of the court, on receiving the indictment, to order a warrant to issue for the arrest of the party therein charged with felony. The order of the sessions sending the case to Justice Dowling to be investigated was an unnecessary and irregular order, and did not alter the liabilities of the party or relieve him from the consequences which followed the finding of the indictment against him. The supposition, therefore, that it is simply a proceeding to review Justice Dowling's decision, not to admit the prisoner to bail—upon the ground that the prisoner, in offences of this character, has a right to be bailed—is a mistake. The justice, when the case was sent back to him for further examination, did not acquire any right to let the prisoner to bail. That power ceased whenever a bill of indictment was found, and that indictment remained in full force against the prisoner notwithstanding the order of the General Sessions. In fact, the order of that court sending back the case to the police justice was an unusual proceeding, not provided for by the statute, and not required by any rule or provision of criminal law within my knowledge. I am referred to the opinion of Judge Edmonds in the case of Dewey on these questions, but there the case was in the Oyer

Babcock's Case.

and Terminer; the Deweys had been arrested and brought before a magistrate, and had been deprived of the benefit of the examination provided by the statute, by being indicted before such examination was completed. But in that case the learned justice says:—"It is true that a person may be indicted in the first instance without any preliminary arrest, and thus by the action of the Grand Jury be deprived of the preliminary examination." The opinion in that case does not apply here, and I do not feel at liberty to give any force to the orders of the General Sessions sending the case to Justice Dowling for examination, because the same was not warranted or required by the statute. The prisoner having been indicted in the Court of Sessions, that court had, during its session, the right to let the prisoner to bail. This is provided by the Revised Statutes, 3d vol., 5th ed., page 1,020, section 59. That section directs that in cases where by law persons indicted may be let to bail for their appearance, they may be so let to bail by the court having jurisdiction to try the offence or, if such court be not sitting, by any justice of the Supreme Court, and if the offence may be tried in a Court of General Sessions, by a county judge; and section 60 prohibits any other officer from letting to bail any person indicted for any offence. It is apparent from these provisions, that when the case was sent to Justice Dowling he had no authority to let the prisoner to bail; and it is equally clear that during the session of the court having jurisdiction to try the offence, such court alone has authority under the statute to let to bail, and that a justice of the Supreme Court is only authorised to do so where the court has closed its session. It has also been suggested on this application that, as the Court of Sessions has committed the prisoner, the right to bail has been adjudicated. This was the decision of the General Term in the *People against Cunningham*, 3 *Park. Cr. R.*, 520. Such would undoubtedly be the proper rule if the decision of the Court had been made before the allowance of the writ and such facts appeared in the return. It may well be doubted whether a proceeding on habeas corpus or certiorari can be defeated by such a commitment made after the allowance and issue of the writ. It is not, however, necessary for me to discuss this branch of the case, as for the reasons before stated I think the prisoner at

 McWilliams v. Mason.

this time can only be bailed by the Court, and that a magistrate out of court has no authority until after the session of the court has terminated, and even then it might be considered *res adjudicata* if the Court during its session should pass upon such an application. The prisoner must be remanded to custody.

*31 affirmed
N.Y. 294*

McWILLIAMS *against* MASON.

New York Superior Court; General Term, November, 1863.

CAUSE OF ACTION.—PRINCIPAL AND SURETY.

Although a surety or guarantor, who agrees to become bound for a certain sum to be loaned in cash to his principal for particular purposes, is relieved from liability if the lender, knowing of such agreement, advances the amount merely by transferring securities for a part, and adjusting the residue by discharging an old debt; yet, where the agreement of the lender to make such an advance upon the guaranty is first made, and the guaranty having been afterward obtained the lender faithfully performs his agreement, the surety or guarantor is not absolved from liability because the principal debtor induced him to become bound by a concealment or misrepresentation as to the nature of the agreement, unknown to the lender. The previous decision in this case in 6 *Duer*, 276, distinguished and approved.

Appeal from an order denying defendant's motion for a new trial after verdict, and from judgment entered against him on the verdict.

The action was brought by James H. McWilliams against John M. Mason, upon the defendant's guaranty of payment of the bond of Thomas Carlile, for fifteen hundred dollars. The bond and guaranty were given to Townsend, the plaintiff's assignor.

The defence was that the defendant had been induced to sign the guaranty upon the representations of Carlile, that he wanted the money to go into business with in Ohio, and that Townsend would advance the money. The defendant, in his answer, averred that Townsend knew of this representation, and that, instead of advancing the fifteen hundred dollars in money, he

cancelled a prior indebtedness of Carlile to him for part of the amount, and transferred, for the balance, a mortgage made by one Little on property in Brooklyn, upon which was due, at the time of the transfer, the sum of one thousand two hundred and ninety-three dollars and fifty-five cents.

On the trial, which was had before Chief-Justice BOSWORTH and a jury, on the 10th of June, 1862, the defendant proved by Carlile that the first acquaintance of the latter with Townsend was when Townsend made him a loan of one hundred and fifty dollars; that previous to such loan, Townsend had called on him for the payment of an old note of the witness then long past due, which he, Townsend, held; that shortly after the one hundred and fifty dollar loan, the witness applied to Townsend for a further loan of fifteen hundred dollars, and proposed to give him his bond, guaranteed by the defendant; that Townsend took the matter into consideration; that the witness obtained the defendant's consent to guarantee his bond for such a loan; that he informed Townsend of such consent; Townsend then said he had not the money, but he had a mortgage for twelve hundred dollars, with some accumulated interest upon it; the witness agreed to take the mortgage and the note which Townsend held, amounting to one hundred and ninety-seven or one hundred and ninety-eight dollars, which had been protested for some time.

The fifteen hundred dollars was made up of the mortgage by Little, and interest, and the old note of Carlile, all of which were transferred by Townsend to Carlile on the execution and delivery of the bond and guaranty. Carlile negotiated the mortgage, and received upon it one thousand and seventy-five dollars in cash.

The defendant testified that Carlile applied to him to give him his guaranty, saying he had an opportunity of entering into business in Ohio, provided he could obtain fifteen hundred dollars; that he could procure it of Townsend if he (defendant) would guarantee his bond. He further testified that he signed the guaranty in Townsend's presence, and that Townsend did not disclose to him what he was going to let Carlile have for the bond and guaranty. |

Townsend, who was examined as a witness by the plaintiff, gave a somewhat different relation of the transaction from that

testified to by Carlile. He said Carlile knew he had the Little mortgage, and wanted him to let him have it, and made a proposition to give him his bond and the guaranty for the mortgage and note; that he offered the guaranty of the defendant; that, after inquiring into the responsibility of the defendant, he consented to exchange the Little mortgage and note for the bond and the guaranty. This witness testified that he declined peremptorily loaning Carlile any money, and that he never entertained any such proposition whatever. The witness further contradicted Carlile in several important particulars. And he testified to a conversation with the defendant, before the guaranty was signed, in which he informed the defendant of the entire transaction; told him what he was going to give Carlile, viz: the mortgage and Carlile's note, and that the defendant signified his assent, and approved of it. The defendant denied that any such statement was made to him.

The defendant's counsel requested the court to charge, that if the defendant entered into the guarantee for the purpose of raising fifteen hundred dollars in money to assist Carlile to go into business, and Townsend, instead of advancing that amount, or any thing in money, gave Carlile only the Little mortgage and the \$197 note, and did not communicate to the defendant the fact that he was advancing the mortgage and the note, the plaintiff cannot recover any thing: also

That if there was an interview between Townsend and the defendant, prior to the consummation of the transaction between Carlile and Townsend, and Townsend then omitted to inform the defendant what he had agreed to give Carlile on the bond and guaranty, the plaintiff cannot recover.

The judge refused so to charge, and the defendant excepted.

The court among other matters substantially charged the jury, that if Townsend believed that the nature of the transaction was known to the defendant, and he had no reason to suppose that any misrepresentation had been made by Carlile to the defendant, then the plaintiff was entitled to recover, at all events the \$1075 actually received in money. And further, if the jury believed the mortgage was intrinsically worth the sum secured by it, or that Townsend so regarded it, then the plaintiff was entitled to recover the sum secured by the mortgage, with interest from the time of its maturing to this date. But that he would

not be entitled to recover the amount of the note which was surrendered, because, upon the evidence, it was worthless.

To this part of the charge the defendants excepted.

The jury found a verdict for the amount of principal and interest of the mortgage.

Judgment was entered upon the verdict. A motion was made at special term for a new trial, which was denied.

The defendant appealed from the judgment and order.

John W. Edmonds, for defendant, appellant—I. It was distinctly held by the general term of this court, on the former occasion (6 *Duer*, 276) that the manner in which Townsend had paid the consideration of the \$1,500 bond exempted the defendant, as guarantor of the bond, from any liability. 1. The true question, therefore, to be presented to the jury was that contained in the first request of the defendant, viz: whether Townsend had advanced only the Little mortgage and the notes. 2. For if he had, then the case was brought within the rule laid down by the general term, that the guarantor was thereby discharged from liability. 3. And the judge, at trial term, has no right to depart from the rule laid down by the general term. 4. Besides, the defendant went into the trial upon the principle laid down at the general term, and brought his case within that principle, and he has a right to complain that his case was tried on a principle entirely different. 5. If the court, at trial term, had submitted the case to the jury on the principle ruled at the general term, there would have been no room for the jury to have found a verdict otherwise than for the defendant. 6. But the jury were permitted to find that though Townsend had paid for the guaranty by the mortgage and the old notes, yet the guarantor was liable for the amount actually received by the borrower, and was not exempted from liability, as the general term had held. 7. The question presented was whether the guarantor was entirely discharged from liability. The general term held that under a certain state of facts he was. The trial term held that under that state of facts, he was not entirely discharged, but was still liable for the amount actually received by the borrower. 8. Upon this decision of the general term, on which the de-

fendant went down to trial, he has a right now to have a new trial.

II. The ruling of the general term was right, and the deendant was in law entirely discharged by the facts which the jury found, and the judge assumed to have been proved. The lender, without the knowledge or consent of the guarantor, but by collusion with the borrower, diverted the guaranty from the purpose for which it was given, and thus varying the contract, the guarantor was discharged (*Philips v. Austlins*, 2 *Taunt.*, 206; *Evans v. White*, 5 *Bing.*, 485; *Bacon v. Chesney*, 1 *Stark.*, 192; *Glyn v. Hertell*, 8 *Taunt.*, 208; *Bonser, v. Cox*, 4 *Beav.*, 380; *Bonar v. McDonald*, 1 *Eng. L. and E.*, 1; *Owen v. Hornan*, 3 *McN. & G.*, 378; *U. S. v. Liffler*, 11 *Pet.* 86; 1 *Parsons on Cont.*, 497, note rr.; *Bigelow v. Benton*, 14 *Barb.*, 128; *Ludlow v. Simonds*, 2 *Cal. Ca.*, 1; 1 *Leeds v. Dunn*, 10 *N. Y.*, 469).

III. The discharge of the surety in such case is not merely *pro tanto*, but is *in toto*. 1. The bond and guaranty were for \$1,500. The jury have found by their verdict that the sum of \$1,500 was never advanced to Carlile by Townsend, but only the amount of the Little mortgage, and the accrued interest, viz. \$1,293.55. This arrangement between the principal and the creditor being different from that to which the surety had agreed, he is not bound by it at all for any sum. 2. Principle *strictissimi juris* governs the case, and the surety has a right to say, "I did not enter into that agreement, and I am not bound by it." 3. Such is the whole current of authority in England and in this country, and the idea that the surety can be held for any part performance is utterly repudiated in all the cases. (*Walrath v. Thompson*, 2 *N. Y.*, 185; *S. C.*, 6 *Hill*, 540; *Hunt v. Smith*, 7 *Wend.*, 179; *Miller v. Stewart*, 9 *Wheat.*, 703; *Wright v. Johnson*, 8 *Wend.*, 512; *Rathbone v. Warren*, 10 *Johns.*, 595; *Witchen v. Hall*, 5 *B. and Cr.*, 269; *Pidcock v. Bishop*, 3 *B. and Cr.*, 605; *Stone v. Compton*, 5 *Bing. N. C.*, *Thobald on Surety*, 147).

A. R. Dyett, for plaintiff, respondent, cited 23 *N. Y.*, 252; 6 *Hill*, 56; 21 *N. Y.*, 531; 16 *N. Y.*, 125; 4 *Kern.*, 623; 5 *Bing. N. C.*, 142, and argued that the right of the

McWilliams v. Mason.

plaintiff to recover in this case as governed by no other or different principle than that which governs the rights of *bona fide* holders of promissory notes and bills of exchange, purchasers of goods and mortgages, who are always protected against the secret frauds of others (*cases cited supra*)—a totally different principle from that which charges a chose in action in the hands of an assignee with the defence and equities of the original parties: that Carlile was the agent of the defendant in delivering the guarantee, and whether he had power to deliver it for the consideration actually received, is not the question. The question is, whether Townsend had a right to believe such a power existed—and he certainly had, and the defendant is bound by Carlile's act. (21 *N. Y. Rep.*, 531; 4 *Kern.*, 623).

BY THE COURT.—MONELL, J.—The learned Chief Justice before whom this cause was tried, presented it for the consideration of the jury in three aspects:

First—If the jury should find that the defendant was applied to, to guaranty the bond, on a representation that Carlile wished the money for the purpose stated, and on a representation that Townsend would advance the money on the bond and guaranty; and if the jury also believed that Carlile informed Townsend that he had made this application to the defendant who had agreed to guaranty the bond, and that afterwards, without any communication whatever with the defendant, Townsend arranged with Carlile, instead of loaning \$1,500, to give him the mortgage and note, then the defendant was not liable. This was the theory of the defendant's defence, and the learned justice followed the decision of this court, when the case was before them on appeal from a former judgment, (6 *Duer*, 276). The view of the law thus presented, was most favorable to the defendant, and he took no exception. The jury were left to determine, upon the evidence, whether, on this view of the case, the defendant was entitled to their verdict.

The *second* aspect in which the case was presented, involved the determination by the jury, between the conflicting evidence of Townsend and the defendant, as to an alleged interview between them prior to the defendant's giving the guaranty. And

the jury were instructed that, if they believed that in that interview Townsend communicated to the defendant that he was to give Carlile the mortgage and note for the bond and guaranty, and that the defendant assented to it, the defendant was liable.

The *third* aspect was, that if the jury should find, that Townsend believed that the transaction, as agreed to between him and Carlile, was known to the defendant, and had no reason to suppose any misrepresentation had been made by Carlile to the defendant, then the plaintiff was entitled to recover the \$1,075 actually received in money. And if they should further find that the mortgage was intrinsically worth the sum secured by it, the plaintiff should have a verdict for the whole principal secured by the mortgage, with interest from the time of its maturity.

To this part of the charge the defendant excepted.

Each of these three propositions, it will be seen, involved the consideration by the jury of the evidence pertinent to each, and having found a general verdict for the plaintiff, we must assume that the facts have been found against the defendant. Nothing was withheld which could be legitimately considered by the jury, and their finding must be conclusive on the facts.

As the case is presented to us, I do not see any necessity for examining the part of the charge excepted to. Each of the three propositions contained in the charge, was distinct and applied the law to a different state of facts. They were wholly independent of each other, and were capable of separate examination. It is impossible to say upon which the jury found their verdict, or whether they found it at all. If they found it upon the *second*, then the defendant was not prejudiced by the legal propositions contained in the *third*; for no one can doubt that if Townsend communicated the arrangement to the defendant, and he assented to it, he would be liable upon his guaranty.

Assuming, however, that the jury founded their verdict upon the propositions contained in the part of the charge excepted to, either wholly, or in connection with other parts of the charge, let us see whether the exception was well taken.

When this case was before this court upon the former appeal, the facts in the case were materially different. Neither Townsend nor the defendant had been examined as witnesses; and

McWilliams v. Mason.

the referee found, as *a fact*, that Townsend had notice of the representation of Carlile to the defendant, that he, Townsend, would loan him fifteen hundred dollars upon his bond, guaranteed by the defendant. Upon this state of facts, the very able opinion of the general term was pronounced; and they properly decided, that the defendant, having agreed to become bound for fifteen hundred dollars, to be advanced in cash to his principal for business purposes, was relieved from liability if the lender, knowing of such agreement, advanced but the equivalent of a thousand dollars, and adjusted the residue by discharging an old debt against the principal.

The court did not decide, nor did they intend to decide, that any misrepresentation made by the principal to procure the guaranty, wholly unknown to the lender, would vitiate the obligation. None of the cases cited by the learned judge sanction any such doctrine. They are cases where the creditor has *agreed* to advance a certain sum, and then, without applying the guarantee, advanced a less sum; or, as in *Evans v. Wagle*, 5 *Bing.*, 485, where the defendant guaranteed the plaintiff to the extent of £50 for any gold he might supply Evans, for the purpose of working in his business, and the plaintiff discounted the bills of Evans, and paid him partly in money and partly in gold. In all these cases the consideration for the guaranty, was the agreement to do a certain thing, which *afterwards* was departed from without the knowledge or consent of the guarantor. But I have been unable to find any case where the agreement between the creditor and principal debtor has been kept, that the surety or guarantor has been absolved from liability, for the reason that the principal debtor has concealed or misrepresented to the guarantor the true nature of the agreement. And upon principle, as well as upon sound morals, he should not be; for by becoming security he has induced the creditor to part with his money upon an agreement, formed before the guarantee was made, which was the basis of the guaranty, and which he has faithfully kept. But there is authority for this:

In *Van Duzer v. Howes*, 21 *N. Y.*, 531, the defendants wrote their acceptance on the bill, and entrusted it to Webb while it was in blank as to the amount, relying upon his promise that he would not fill the blank for more than one thousand

McWilliams v. Mason.

dollars. He violated his promise by inserting twelve hundred dollars, and causing it to be negotiated for that amount. The plaintiff discounted it without any knowledge of the fraud, and paid the whole proceeds to Webb. And the question was which party was to suffer on account of the misplaced confidence reposed in Webb. And the court say it was the defendants, who, by entrusting their blank acceptance to the disposition of Webb, enabled him to commit the fraud.

At most, in the case at bar, the fraud consisted in a misrepresentation made by Carlile to the defendant. Townsend was not a party to the fraud. The defendant entrusted his guaranty to Carlile, reposing confidence in his representation, and Townsend parted with his unduly upon the security of the guaranty, without departing from his agreement. Upon the authority of the case last cited, the defendant and not Townsend must suffer for the misplaced confidence.

The appellant's counsel substantially admits this to be the correct view, for his second point is "that the lender, without the knowledge or consent of the guarantor, but by collusion with the borrower, diverted the guaranty from the purpose for which it was given." Unfortunately for him, however, the jury did not so find; on the contrary, they found there was no collusion with the borrower.

There was a conflict of evidence as to whether Townsend was acting in good faith, and whether Carlile had made misrepresentations to, or had practiced a fraud upon the defendant. All these questions were fairly presented to the jury, and the jury having found that Townsend's connection with the transaction was not *mala fides*, and that if any fraud was practiced by Carlile upon the defendant, Townsend was not, even by implication, a party to it, I can discover no reason why the defendant should not be liable.

In my judgment there was no error in the portion of the charge excepted to by the defendant.

If the views which I have here expressed are correct, then it follows that there was no error in refusing to charge as requested by the defendant. Had Townsend deviated from his agreement with Carlile, made before the guaranty was signed, he would have been bound to have communicated it to the de-

Rawson v. Pennsylvania Railroad Co.

pendant. Whether there was any such direction was a question upon the evidence, for the jury, and was properly left to them.

The restriction of the recovery to the amount secured by the mortgage was most favorable to the defendant. But, as Carlile's liability on the bond was only to the extent of the value received by him, so, the defendant could not be charged for any greater sum.

I think the judgment and order appealed from should be affirmed.

*affirmed
48 N.Y. 212.*

RAWSON *against* THE PENNSYLVANIA R. R. Co.

Supreme Court, First District; General Term, February, 1867.

PARTIES.—SUITS BY MARRIED WOMEN.—SEPARATE ESTATE.

Under the statutes relating to married women, the common law rule that a wife cannot take by gift from her husband is abrogated.

Hence a married woman may maintain an action for the loss, by the negligence of the defendants, of apparel and jewelry which were a gift to her, whether from her husband or any other person.*

Although common carriers may, by positive contract, limit their liability, they cannot do so by a mere notice, whether placed on a ticket or elsewhere, even where the notice is brought to the knowledge of the persons with whom they deal.

The question what articles in a passenger's trunk were necessary for the journey, is a question of fact, to be determined by the jury.

* The following cases further illustrate the rule laid down by the decision in the text.

In the case *Young v. Gori* (*Supreme Ct. Chambers, 1861, 13 Abb. Pr., 13, note*), it was held that, under the act of 1860, ch. 90, §§ 7, 8, a married woman carrying on a business, in the course of that business can make contracts, and enter into engagements which shall be binding on her, and her property generally. A suit on a contract made by her, in the course of her business, is a suit having relation to her separate property. The goods purchased by her and the profits are her separate property. The good-will of the business is hers, and the business itself, so far as it can in any sense be

Rawson v. Pennsylvania Railroad Co.

Appeal from a judgment.

The plaintiff in this case was a married woman, and while traveling with personal baggage on the defendant's road, the baggage was lost. She brought this action in her own name, without joining the name of her husband, to recover damages for the loss.

After verdict in her favor, the defendant appealed.

BY THE COURT.—CLERKE, J.—I. From the principle of the common law, which regards the husband and wife as one person, it has been always held that the legal existence of the latter was suspended during the marriage, and, consequently, that all her personal property was vested in the husband. He could not make any gift to her, except through the intervention of a trustee; and even her necessary apparel and jewels (her paraphernalia) he could dispose of absolutely, during his

deemed property, is hers. Any contract having relation to that business, has relation to that which belongs wholly and exclusively to her, over which her husband has no control, and in which he has no part or lot. Hence, when a married woman carries on a separate business under the act of 1860, she is to be regarded, so far as that business and everything connected with, or appertaining to it, in the same light as a man, and may sue and be sued as such.

In the case of *Mann v. Marsh* (*Supreme Ct.*, 1861, 35 *Barb.*, 68 less fully reported, 21 *How. Pr.*, 372), it was held that section 7 of the act of 1860, has essentially changed the rights of the husband and wife in respect to torts committed upon the person or character of the wife, and has made her the sole plaintiff in actions brought for them, and given her the exclusive right to the damages, and recovery therefor, and has taken from the husband all right to a control over actions brought for damages for such injuries. Assaults and batteries, and slanders, are now made a part of the separate estate of the wife, and in respect to them she is a *feme sole*. Under this statute, then, there is no cause of action in a husband and wife jointly for an assault on the wife.

In the case of *Badgley v. Decker* (*Supreme Ct.*, 1865, 44 *Barb.*, 577), it was held that a married woman having a right, under the statute of 1860 (*Laws of 1860*, ch. 66, § 2), to keep a boarding-house on her own account, and consequently to employ servants, may sue for any injury to her servant, as if she were unmarried; that being a necessary incident to the right to carry on business on her own account. Thus, for seducing her servant, followed by a loss of service, she may sue without joining her husband.

Rawson v. Pennsylvania Railroad Co.

life time (*Graham v. Londonderry*, 3 *Atk.*, 394). Even after his death they were liable to his debts, if his personal estate should be exhausted; although he could not dispose of them by will, and, if the personal estate should be sufficient to pay his debts, she becomes entitled to them at his death.

Does this rule of the common law remain unchanged among us?

The act of 1848 merely provided that the property of any woman, who should thereafter marry, should not be subject to the disposal of her husband, or liable for his debts, and that the property of any woman then married should be likewise exempted from the disposal of the husband, except so far as it may be liable for his debts theretofore contracted. In both cases, it was declared that her property should be sole and separate, like that of a single woman; with the exception just mentioned. The act of 1849, extended this privilege, by providing that any married woman may take by inheritance, gift, grant, devise, or bequest from any person, *other than her husband*, and hold to her sole and separate use, and dispose of the property thus obtained, in the same manner and to the like effect as an unmarried woman could dispose of the property, and it was to be free from the disposal of her husband, and from liability for his debts. The act of 1860 (*Laws of 1860*, p. 157), still further extends the privileges of married women; and in the 7th section it allows a married woman to sue and be sued in the same manner as a single woman, in all matters relating to her property, which she then possessed, or which may thereafter come to her by descent, devise, bequest, or the gift of any person, *except her husband*. We see that these several acts were all progressive, each successively increasing the privileges of married women with regard to property; but they contain nothing which warrants the supposition that a husband could make any gift to his wife, that he could not have made previous to 1848. The act of 1862 (*Laws of 1862*, p. 343), which is chiefly amendatory, amends the 7th section, to which I have referred, of the act of 1860, by omitting the words "except her husband" after the word "person;" so that she may sue and be sued in all matters having relation to any property obtained from her husband, as well as

from any other person. When we consider the spirit by which this legislation was set in motion, and the progressive character of these several enactments, I think that we may safely infer that the legislature intended, by the act of 1862, to repeal the rule of the common law, that a gift from a husband to a wife could not invest the property in her. This rule, indeed, is not repealed by express words; but the 7th section of the act of 1860, as amended by that of 1862, is inconsistent with it, and the common law rule may therefore be considered as impliedly repealed.

As a married woman can maintain an action in relation to property obtained from her husband, as well as from all other persons, the denial of her sole and separate right to that property as donee would be inconsistent with her right to sue for it. At all events, she has plainly the right to maintain an action for any property which has been given to her by her husband, whatever claim he or his creditors may have to it, after it shall be recovered. I hold, therefore, that the plaintiff can maintain this action for the loss of that portion of her apparel and jewelry which was the gift of her husband, as well as for that which was the gift of her son.

II. Are the defendants liable as common carriers, notwithstanding the notice on some of the series of tickets, which she purchased at the beginning of her journey on the defendants' road?

Railroad companies, as we all know, are subject to the same responsibility, which the law has always imposed on common carriers, and are, therefore, insurers of the safe conveyance of goods entrusted to them for transportation, except against accidents which no human prudence can avoid or control. How far can they limit this responsibility? This question can be answered without difficulty; for no rule is more distinctly settled in this State, than that they may do so by positive contract;—the owner of the goods, or the passenger, voluntarily, and for a valuable consideration, waiving his right to indemnity; but, they cannot do so by any notice placed on a ticket, or elsewhere, even where such notice is brought to the knowledge of those whose persons or whose property they undertake to carry. It is only necessary to refer to one of the many

Fannin v. McMullen.

recent authorities on this subject (*Bissell v. The N. Y. Central R. R. Co.*, 25 *N. Y.*, 442).

In the case before us there was no such contract, nor was there any notice on the ticket, to be used on the defendants' road. On the tickets which she bought with the other tickets from the defendants' agent, but which were to be used on the *N. Y. Central R. R.*, from Easton to New York, and which were issued by that company, there was a notice limiting the liability to one hundred dollars, unless extra fare should be paid. So that there is not the slightest doubt that the common law liability of the defendants remains in full force. It is consequently unnecessary to consider whether the defendants were guilty of negligence; for as we have seen, whether guilty or not of negligence, they are liable as common carriers.

III. To what extent are they liable? This was a question solely for the jury; and it was explicitly submitted to them. The kind and quantity of the materials constituting the baggage of a traveller must depend upon his tastes and habits, his pecuniary circumstances, his position in society, and, we may add, the conveniences and necessities of the particular journey. This, of course, can be ascertained only from testimony taken before the jury, and submitted to them. They have decided that the apparel and jewelry contained in the plaintiff's trunks, which were lost, were necessary for her on her journey; and their verdict cannot be disturbed.

The judgment should be affirmed, with costs.

FANNIN *against* McMULLEN.

New York Common Pleas; Special Term, March, 1867.

PARTIAL PERFORMANCE.—ACTION ON PAROL CONTRACT FOR
LANDS.

Equity will enforce a parol agreement for a joint interest in land, at the instance of a party to it, who has fulfilled his part by full payment, and where it may be inferred that fraud would result from a refusal to decree performance.

Fannin v. McMullin.

Although a partial payment is not sufficient to take the case out of the statute, if full payment has been made, equity demands that execution should be decreed.

Motion to dismiss complaint at the trial.

This action was brought by Richard Fannin against William McMullin, and John Fenner and his wife, to enforce specific performance of a contract of purchase of lands.

The plaintiff had advanced money to enable the defendant McMullin to complete a purchase of real property, upon an agreement for an equal interest in the property upon contributing equally to the purchase money. The plaintiff in fact advanced more than a moiety of the purchase money, and the title was conveyed to the defendant Fenner for the purposes of the agreement. The plaintiff now sued for specific performance.

DALY, F. J.—A court of equity will enforce a parol agreement for a joint interest in land where the party seeking to enforce it has executed the agreement fully on his part, by the payment of all that he was to pay under it, and where it is inferable from the circumstances that the party refusing to perform designed to perpetrate a fraud, which, if a specific performance were not decreed, he might be able to accomplish, his pecuniary ability being so doubtful as to make it uncertain whether the other party could recover back the money he had paid (*Walker v. Walker*, 2 *Atk.*, 100; *Lacon v. Merkins*, 3 *Id.*, 1; *Frame v. Dawson*, 14 *Ves.*, 386; *Story Eq.*, §§ 759, 760; *Williard Eq.*, 284).

A partial payment of the purchase money will not take a case out of the operation of the statute, because the legislature having said that it should have that effect in the case of goods, and having omitted to say so in respect to lands, it is to be inferred that they meant that a partial payment should not make the contract binding in the case of lands (*Clinan v. Cooke*, 1 *Sch. & R.*, 41). But the same inference does not follow where the whole amount is paid. The contract is then fully executed by one, and equity demands that the other should be compelled to perform his part of it. "Where one part of the agreement," said Lord HARDWICKE, in *Walker v. Walker* (*supra*), "is per-

Fannin v. McMullin.

“formed on one side, it is but common justice that it be carried “into execution on the other.”

Such is the present case, as it appears on the evidence now before me. The defendant McMullin bought a lot, with an unfinished house upon it, at auction, and being unable to pay the whole of the sum required as a deposit upon the sale, he agreed by parol with the plaintiff to give him an equal interest in the purchase, if the plaintiff would pay one half of the deposit, and one half of the other installments as they become due. The plaintiff accordingly paid one half of the deposit, and when the next payment became due, McMullin being unable to pay the whole of his proportion, the plaintiff had to pay the principal part of it in addition to his own, and, when the final payment was made, the plaintiff had paid three hundred and ninety dollars, and McMullin but one hundred and fifty dollars. It was also a part of the agreement that the house should be finished at their joint expense, and that, when completed, the house and lot should be sold, and whatever profit was made upon the sale should be equally divided between them. These payments having been made, a mortgage was given for the residue of the purchase money, and by an arrangement suggested by McMullin, the property was conveyed to the defendant Fenner, an irresponsible person, who was to hold the title until the building was finished, and a sale of the property was effected. Six months elapsed without anything being done upon the building, and now McMullin and Fenner, co-operating together, repudiate the agreement; and upon this state of facts being shown, they fall back upon the statute of frauds, and ask me to dismiss the complaint.

If a transaction like this could be consummated by reason of the statute, it might be justly characterized as a statute rather for the encouragement than for the prevention of frauds. It would be a reproach to the law if the aid of a court of Equity could not be invoked in such a case. Its right to interpose may be rested upon three grounds: 1. That the plaintiff has executed his part of the agreement by paying even much more than he was bound by the terms of it to pay. 2. That the facts warrant the presumption of a fraudulent design on the part of the defendants McMullin and Fenner. 3. That Fenner is irresponsible, and it is to be inferred that McMullin

Smith v. May.

is a person of little or no pecuniary ability, as he was unable to meet his proportion of the payments as they fell due, making it highly probable that the plaintiff would lose what he has paid, if the Court should refuse to compel a specific performance of the contract. The motion to dismiss the complaint will, therefore, be denied, and the defendants will have to go into their defence, if they have any.

SMITH *against* MAY.

Supreme Court, Sixth District; General Term, November, 1866.

APPEAL FROM JUSTICE'S COURT.—COSTS ON APPEAL.

In determining which party to an action brought by appeal from a justice's court to a county court, should recover costs of the appeal, the county court can only compare the judgment of the justice, as it was rendered with the recovery in the county court. The statute does not authorize the county court to cast interest on the judgment of the justice, and add it to such judgment, to make the amount to be compared with the verdict in the county court.

Appeal by defendants from an order of the Otsego county court, awarding costs to the plaintiffs in that court.

This action was brought by Calvin P. Smith against William May and Lewis Spencer. The facts are stated in the opinion.

Dewitt C. Bates for plaintiff.

James E. Dewey for defendants.

BALCOM, J.—This action was originally brought before a justice of the peace, for defendants' wrongfully taking from plaintiff's possession, and carrying away and converting to their own use, certain personal property that belonged to the plaintiff. The plaintiff recovered a judgment against the defendants before the

Smith v. May.

justice for \$149 75 damages, besides costs. The defendants appealed from the judgment to the Otsego county court. The jury in the latter court rendered a verdict in favor of the plaintiff for \$152 46 damages, for which the clerk of Otsego county entered a judgment against the defendants; but he also entered a judgment in their favor for costs against the plaintiff. The county court made an order setting aside the judgment for costs in favor of the defendants, and directing the clerk of that court to adjust the plaintiff's costs, and enter judgment in his favor for such costs. The defendants have appealed from that order of the county court to this court.

The appellants' counsel claimed that the verdict of the county court was more favorable to the defendants than the judgment of the justice, because interest on that judgment from the time it was rendered to the day the verdict in the county court was received, if added to the judgment, would make it larger than the verdict.

The order of the county court awarding costs to the plaintiff was made the 20th day of January, 1866, and the question in the case must be decided by this court by the Code as it then existed.

The judgment for damages in the county court was for \$2 71 more in favor of the plaintiff than the judgment in his favor was before the justice. Hence the judgment of the county court was more favorable to the respondents and less favorable to the appellants than the judgment of the justice (*Code*, sec. 371).

The language of the Code at the time the county court made the order appealed from, was, if the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, the appellant shall recover costs, otherwise the respondent shall be entitled to costs (*Code*, sec. 371).

There is no provision in the Code that authorizes the county court to cast interest on the judgment of the justice, and add it to such judgment, and then compare the amount with the verdict in the county court, for the purpose of determining whether the verdict is more favorable to the appellant than such judgment.

The county court can only compare the judgment of the justice, as it was rendered, with the recovery in the county court, in determining which party to the claim should recover costs.

Thompson v. Jenks.

This court decided this very question at a general term in 1864, in *Whitney v. Wells*. In that case the plaintiff recovered a judgment, fifty dollars damages, for the conversion of wood, before a justice of the peace. The defendant appealed from the judgment to the Cortland county court, where the jury rendered a verdict against him for fifty dollars damages. The defendant contended in the county court that he was entitled to costs, because by adding interest to the judgment of the justice, it would make it greater than the plaintiff's recovery in the county court. But the county court awarded costs to the plaintiff, and the defendant appealed to this court from the order allowing the former to recover costs; and this court affirmed that order of the county court.

I am unable to see any reason for overruling our decision in *Whitney v. Wells*.

My conclusion is that the order of the county court, in this case, awarding costs to the plaintiff, was correct, and that it should be affirmed with costs.

BOARDMAN, J., delivered an opinion in which he came to the same conclusion. PARKER and MASON, JJ. concurred.

Judgment accordingly.

THOMPSON *against* JENKS.

Supreme Court, Sixth District; General Term, November, 1866.

STIPULATION.—REVIVAL OF JUDGMENT.—EXECUTION.

After the lapse of twenty years from the docketing of a judgment, it is not competent for the parties to revive it by an order entered upon a stipulation by consent. Judgment cannot be revived or renewed except in the manner prescribed by the statute.

Where the defendant, in a judgment recovered in a justice's court, gave a stipulation that execution might be issued thereon, *Held*, that an execution issued by an attorney was not valid; and if it had been, it was competent for the defendant, before sale to object to the enforcement of the execution.

Thompson v. Jenks.

Motion for a new trial on exceptions.

This action was brought by Chauncey L. Thompson against Elmer D. Jenks to recover the value of some cattle the defendant caused to be levied upon and sold by virtue of an execution in his favor against the plaintiff.

The defendant obtained a judgment against the plaintiff before a justice of the peace for \$202 34 damages, and sixty-two cents costs, on the 10th day of April, 1841. A transcript of the judgment was filed in the office of the clerk of Madison county on the 12th day of June, 1841, and the judgment was docketed in his office on that day.

At the time the plaintiff confessed the judgment before the justice, the defendant gave him a stipulation to the effect that no execution should be issued on the judgment until after the death of the plaintiff's father.

The father of the plaintiff died on the 30th of July, 1856.

On the 30th day of September, 1862, the plaintiff gave a stipulation to the defendant, which recited the judgment and the date it was rendered, and the date it was docketed in the office of the county clerk, and the fact that the above-mentioned stipulation was made when the judgment was confessed, and the death of the plaintiff's father. The stipulation contained a consent by the plaintiff "for value received, that the clerk of Madison county, or any other person authorized to issue execution on the judgment," might issue an execution on the same, without any notice to the plaintiff, or any motion therefor. The stipulation also contained a consent by the plaintiff, for value received, that an order might be entered on filing the stipulation, to the effect above mentioned. And the stipulation stated that the plaintiff thereby renewed and revived the judgment, in full force and virtue, for the amount and interest on the same.

The stipulation was filed, and an order was entered in the office of the clerk of Madison county on the 15th day of October, 1862, that the said judgment be revived and renewed, and that the clerk of Madison county, or any other person authorized to issue execution, be, by virtue of said stipulation, authorized to issue execution on said judgment, the same in all respects as if said judgment had been revived and renewed by the court on a regular motion on notice, and an order entered for that purpose.

Thompson v. Jenks.

H. C. Miner, Esq. (an attorney of this court), issued an execution on said judgment, as attorney of the defendant, by virtue of which a deputy of the sheriff of Madison county levied upon and sold the cattle in question.

The plaintiff forbade the sale of the cattle, and also forbade the defendant taking the same away after he had purchased them.

The action was tried at the Madison circuit, in February, 1865. The judge ruled and decided that the judgment was barred by the statute of limitations, and that said judgment, execution and sale passed no title to the defendant of the cattle—and that the stipulation and order did not revive it; that the execution was void, not being issued by the county clerk but by the attorney, and that an execution could only issue by order of the court; and the judge directed the jury to render a verdict in favor of the plaintiff for the value of the property. The defendant's counsel excepted to the above rulings and decisions of the judge. The jury found a verdict for the plaintiff for \$154.49 damages.

Judgment was suspended, and the defendant moves for a new trial on his exceptions.

Pratt, Mitchell & Brown, for plaintiff.

H. C. Miner, for defendant.

BY THE COURT.*—BALCOM, J.—There is some authority for saying that the plaintiff could make a new promise in writing, that would enable the defendant to maintain an action against him on the judgment, which the defendant attempted to enforce by execution; and I am not prepared to hold that the plaintiff's stipulation was insufficient to authorize the defendant to bring an action on the judgment, or to avoid the defence of the statute of limitations to such an action. (See *Carshore v. Huyck*, 6 *Barb.*, 583; 4 *Kern.*, 21). But I am of the opinion that the judgment could not be legally revived by an order entered in the office of the county clerk upon the plaintiff's stipulation. The judgment had lost all force before the plaintiff signed the stipulation for its renewal or revival. More than twenty years

* Present, PARKER, MASON and BALCOM, JJ.

Thompson v. Jenks.

had elapsed after it was docketed in the county clerk's office before the stipulation was given; and it was of no value to the defendant, unless it was a sufficient consideration for a new promise by the plaintiff to pay it (See *Waltemire v. Westover*, 14 *N. Y.* [4 *Kern.*], 16; *Code of Pro.*, §§ 63, 64, sub. 13, § 90; 16 *How. Pr.*, 475; 32 *Barb.*).

Judgments cannot be revived or renewed except in the manner prescribed by statute; and the judgment in question was not revived or renewed pursuant to any statute, but by stipulation, in a way not authorized by any statutory provision.

It cannot be said that the plaintiff consented to the seizure and sale of the cattle in question because he agreed that the judgment should be revived and renewed, and that an execution might be issued thereon. In the first place, the execution was issued by an attorney, when an execution on a judgment of a justice of the peace, which has been docketed in the office of the county clerk, can only be issued by the clerk; (*Code*, § 64, sub. 13; *Brush v. Lee*, 18 *Abb. Pr.*, 398), and the plaintiff did not consent that the execution might be issued by an attorney, but only by the clerk or any other person "authorized to issue execution on the judgment." This consent did not justify the attorney in issuing the execution, for the reason that an attorney is not a person "authorized to issue execution" on such a judgment. In the second place, the plaintiff forbade the sale of the cattle upon the execution, and objected to the defendant taking them away after he purchased them. Hence, if the stipulation was an agreement by the plaintiff that the defendant might do all he did do upon the judgment and execution, the same was not executed before the plaintiff refused to perform it, and objected to its enforcement.

If the foregoing conclusions are correct, the judgment and execution were no defence to the action, and the defendant's motion for a new trial should be denied, with costs.

Ordered accordingly.

THE MUTUAL BENEFIT LIFE INSURANCE CO. *against* .
THE SUPERVISORS OF NEW YORK.

Court of Appeals, December Term, 1866.

ACTION.—INJUNCTION.

An action for an injunction will not lie to restrain the collection of a tax upon an illegal assessment.

The remedy is to review and correct the assessment by *certiorari*, or to strike it from the roll by *mandamus*.

The case of the People v. The New England Mutual Life Insurance Co., 26 N. Y., 303, is not an authority for sustaining such an action, for the objection was not raised in that case.

Appeals from a judgment of the Superior Court of the city of New York, and a judgment of the Supreme Court in the first judicial District.

These were actions instituted to test the liability of these plaintiffs to be taxed on the sum of \$100,000 deposited by them with the Comptroller of this State. The plaintiffs are a corporation under the laws of the State of New Jersey, for the business of Life Insurance. They had an office in the city of New York and an agent there for the transaction of such business. By an Act of the Legislature of this State passed in 1851, chap. 95, all companies transacting the business of life insurance within this State were required to deposit with the comptroller of this State \$100,000 in public stocks or bonds. The comptroller was to hold such stocks, bonds and mortgages as security for policy holders (sections 1 and 2). Under the provisions of this Act these plaintiffs deposited with the comptroller of this State the sum of \$100,000, and this sum has been included in the assessment lists of the city of New York against these plaintiffs as so much personal property liable to taxation under the laws of this State. In 1856 the Board of Supervisors of the city and county of New York imposed as a tax thereon the

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

sum of \$1,383, and the defendants, or some of them, were proceeding to collect the same. The first above entitled action was commenced in the Superior Court of the city of New York.

The complaint set out the foregoing facts, and claimed that the tax was erroneous and unlawful, and should be remitted or corrected. It also set forth that the Board of Supervisors had issued their warrant to the defendant, James Nesbitt, to collect said tax, and that he by virtue thereof has levied upon the property of said plaintiffs; that the amount of the tax when collected would be the property of the defendants, The Mayor, etc. of the city of New York.

The complaint prayed that the defendant might be enjoined from collecting the tax or from interfering with the property levied on, and that the court would adjudge that the defendants be restrained from collecting or receiving the same, or for such further or other relief, or both, as might be just.

Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judgment was given for the defendants, dismissing the complaint with costs, and this judgment was affirmed at the general term.

The second above entitled action was commenced in the supreme court, and the complaint set out an assessment in the same manner, and an imposition of a tax thereon in the sum of \$1,556.44 for the year 1857, and otherwise contained the same facts and the same prayer as the complaint in the superior court.

The demurrer alleged three grounds: First, That the supreme court had no jurisdiction of the subject of the action. Second. That said court could not review by complaint and injunction the proceedings of subordinate tribunals created by and acting under a statute and clothed with the exercise of political powers. Third. That the complaint did not state facts sufficient to constitute a cause of action. Judgment was given for the defendants on the demurrer, and the same was affirmed at the general term, and the plaintiffs now appeal to this court.

The decision below in the Superior Court is reported in 8 *Bosw.*, 683; and that of the Supreme Court in 33 *Barb.*, 322.

A. R. Lawrence, Jr., for the respondents—I. An injunction will not be granted to restrain the collection of a tax illegally

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

imposed upon the personal property of the plaintiff. (*New York Life Insurance Company v. Supervisors of New York*, 4 *Duer*, 192; *Heywood v. City of Buffalo*, 14 *N. Y.*, 534; *Wilson v. The Mayor, &c., of New York*, 1 *Abb.*, 4; *Chemical Bank v. The Mayor, &c., of New York*, 1 *Abb.*, 79; *Moers v. Smedley*, 6 *J. C. R.*, 28; *Mayor v. Meserole*, 26 *Wend.*, 132; *Wiggin v. Mayor*, 9 *Paige*, 16, 24; *Van Doren v. Mayor*, 9 *Paige*, 388; *Livingston v. Hallenbeck*, 4 *Barb.*, 9, 16; *Van Rensselaer v. Kidd*, 4 *Barb.*, 17; *Bouton v. Brooklyn*, 7 *How. Pr.*, 205; *Douglas v. Mayor*, 2 *Duer*, 110; *Mutual Benefit, &c. Insurance Company v. Supervisors of N. Y.*, 33 *Barb.*, 322; *Same v. Same*, 8 *Bosw.*, 683).

II. There is no allegation in the complaint which brings these cases within either of the three exceptions to the general rule that a court of equity will not entertain an action by a party aggrieved, for relief against an erroneous or illegal tax or assessment. (*Heywood v. City of Buffalo*, 14 *N. Y.*, 534 and 541).

III. The appellants had several remedies at law for any injury which they might sustain by reason of the imposition and collection of the taxes mentioned in the complaint. (1) They could review the proceedings of the assessors and the supervisors by *certiorari*. (*Heywood v. City of Buffalo*, *supra*; *Storm v. Odell*, 2 *Wend.*, 287; *Caledonian Co. v. Trustees, &c.*, 7 *Wend.*, 508; *People v. Brooklyn*, 9 *Barb.*, 535). (2) They had a remedy by prohibition against the supervisors and the receiver and constable. (*People v. Works*, 7 *Wend.*, 486). (3) Also by mandamus to compel the supervisors to strike the name and tax from the roll. (*People v. Albany*, 12 *J. R.*, 414; *Ex parte, Nelson*, 1 *Cow.*, 417; *Hull v. Oneida*, 19 *J. R.*, 260; *Bright v. Chenango*, 18 *J. R.*, 242; *People v. New York*, 10 *Wend.*, 393; *Bank of Utica v. City of Utica*, 4 *Paige*, 400; *People v. New York*, 18 *Wend.*, 605; *People v. Watertown*, 1 *Hill*, 616; *People v. Niagara*, 4 *Hill*, 20; *Adriance v. Supervisors of New York*, 12 *How. Pr.*, 224). (4) By an action against the assessors and supervisors committing the wrong, for the recovery of the damages sustained therefrom. (*Mygatt v. Washburn*, 15 *N. Y.*, 316; *Saunders v. Springsteen*, 4 *Wend.*, 429; *Ontario Bank v. Devendorf*, 3 *Denio*, 117; *Pros-*

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

ser v. Secor, 5 *Barb.*, 607; The People v. Supervisors of Chenango, 1 *Kern.*, 563).

IV. The bonds deposited by the appellants with the Comptroller of this State were liable to taxation under the provisions of the Act of February 27, 1855. (*Laws of 1855*, p. 44; *International Life Ass. Co. v. Com. Taxes*, 28 *Barb.*, 318; *British Commercial Life Ins. Co. v. Com. Taxes*, 28 *How. Pr.*, 41; *Laws of 1853*, pp. 892 and 893, secs. 14 and 1).

A. C. Bradley, for the appellants.—I. On the merits, the statutes and the decisions of this court have left nothing to argue—corporations created by other States doing life insurance here must now make their deposits with some officer of the STATE by which they are created (*Laws 1853*, *ubi supra*, sec. 14). This, however, only applies to States *in our Union*, and not to corporations doing life insurance, created by foreign governments. *These* must make deposits with the comptroller exactly as if they were created by this State. (*Laws of 1853*, 893, sec. 15, also secs. 6 and 17; *International Life Ass. Com. v. Com. Taxes*, 28 *Barb.*, 318; *British Commercial Life Ins. Co. v. Same*, 23 *How. Pr.*, 41). It is true that the Massachusetts suit came into court on a “case agreed” (*Code*, sec. 372). But such a proceeding is allowable only where the “question in difference might be the subject of a civil action,” and it is to be submitted to some court “which would have had jurisdiction if an action had been brought,” and which is to “render judgment thereon *as if* an action were depending.” But the case is not required to contain any thing but “the facts on which the controversy depends,” that is, the bare facts constituting a cause of action which the complaint would have had to state, if instead of a case agreed, there had been an action, just what in these cases at bar, the complaints do state, and the demurrers do admit. In that case, it is true that the People were parties—whether the only parties maintaining the validity of the tax the report fails to show—and it is equally true that they may be proper or even necessary parties defendant here. There can, however, be no pretence that they should have been the only parties, and no objection of non-joinder is taken (secs. 144 and 148). All that is or may be suggested about other remedies by special proceedings instead of by action in these cases,

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

was equally or more applicable to that. A *certiorari* would have brought up the assessment roll.

Mandamus, however, if it had been necessary to resort to it, could have done full justice in that case by merely correcting the assessment roll whereby any warrant endangering the company's property would have become impossible. Here, however, the warrant is out and levied and forever beyond that remedy. But in that case it was not necessary, and the objection becomes valid in *these* only on some such ground as that a party wronged is deprived of redress by not having previously resorted to some unnecessary remedy. *Prohibition*, too, if it was an appropriate proceeding for such cases (as notwithstanding the *People v. Works*, 7 *Wend.*, 486; see *People v. Tompkins*, G. S., 19 *Wend.*, 154; *Ex parte Braudlacht*, 2 *Hill*, 367; *People v. Seward*, 7 *Wend.*, 518; *Ex parte Gordon*, 2 *Hill*, 363; *People v. Supervisors*, 1 *Hill*, 195, it clearly is not), might have accomplished something for the New England Company in arresting the *court*, the Board of Supervisors, from further proceeding. But here that court, if it be a court, had got through and stopped already. *Prohibition* never stays-proceeding on mere process issued. The true answer, however, is, that those special proceedings are none of them to be resorted to except when there is no other remedy. But such a remedy always exists whenever the facts constitute a cause of action, for then full justice can be done in determining not only the direct rights of the plaintiffs against defendants, and of defendants against plaintiffs, but also the ultimate as well as direct rights of the defendants, all around among themselves (sec. 274, subd. 1). But it is said that the assessors and the supervisors are now, or will hereafter become personally liable for all damages. Perhaps so; but it is no objection on demurrer only to jurisdiction, and for want of any cause of action in the complaint, that somebody else is or will be liable for the wrong complained of, unless it also appear that the defendants *are not*.

Here these cases might be rested, were it not that the respondents raise questions even upon the concession that the assessments and levies were illegal, and that all the facts and all necessary parties are in court. It is no longer allowable to infer from the non-existence of a known remedy the non-existence of

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

any right or of any wrong; but now the right or wrong being shown, all remedies whatsoever appropriate to the protection or enforcement of the one, or the redress of the other, are as much within the jurisdiction as the parties or cause of action; nay, remedies are all that there ever is or can be of jurisdiction, for courts do not create rights or wrongs, and have no concern with parties or causes of action, except to find or make the remedies justly commensurate with each case as it is. It proves nothing, then, to show that courts of equity would not have taken cognizance of a given case, or that injunction is an inappropriate remedy; for the first objection is true in nine of every ten cases, and the second in ninety-nine of every hundred; or if the new mode of bringing into contempt, by bare service of the judgment, has taken its place, then the objection is good in every case. There will, nevertheless, if private rights exist to be enforced or protected—or private wrongs to be redressed—be abundant remedies.

III. The defendants all belonging in New York and served there, the cause of action having arisen there, and the subject of the action situated there, the Superior Court (sec. 33) as well as the Supreme Court had jurisdiction of the persons of the defendants and of the cause of action.

IV. The second ground of demurrer assigned in the second of the cases at bar, if it raised a question either of jurisdiction or the sufficiency of the facts, is already disposed of with those questions. If it raise any *different* question it states no ground allowable by § 144, and so is no demurrer. Even if it were otherwise, the assumed ground of it does not exist in either of these cases. They do not seek to review by complaint or injunction, or to review at all the proceedings complained of. Whenever one has been injured by the wrong of another he may have redress and immunity, not because the injury was done under color of an illegal tax, assessment, or judgment, but because of the injury. He might sue for the injury omitting all mention of the matters under color of which it was done—and this would be best were it not that the embarrassment arising from possible defences set up by defendants render it more convenient to tell the whole story at the outset. Still the gravamen lies in the bare injury, doing and being threatened. On the other hand, how-

ever, a man not yet hurt, but only afraid of some void tax that may never hurt him, is in a different position. There, in many cases, the court refuse to interfere, not because they are courts of equity any more than courts of law, but simply because *damnum absque injuria* constitutes no cause of action any where.

These cases at bar, therefore, are not cases to review errors *within* jurisdiction—nor yet suits merely *quia timet*, and if they were the latter, the New England case so often referred to, is in point to show that there is a real danger against which it is just that the courts of justice should interfere.

A. R. Lawrence Jr., in reply.—I. The counsel for the appellants, in the statement of the case which precedes his points, alleges that “these suits ask the judgment of the Court whether the plaintiff is liable to two taxes imposed upon it,” while the complaint in each action demands judgment “that the defendants, and all of them, may be enjoined and restrained from collecting, receiving, and paying over the said tax and interfering with, removing, selling, or disposing of any personal property belonging to the said plaintiffs for the purpose of collecting said tax; and that this honorable court will adjudge that the said defendants, and each and all of them, be forever restrained and enjoined from collecting or receiving the same, and for such other or further relief, or both, as may be just.” The whole scope and object of the complaint in each case is the obtaining of an injunction, and most of the allegations in each would be inappropriate if any different relief was sought. Counsel has therefore improperly stated the object of the actions as being “to ask the judgment of the court as to whether the plaintiff is liable to two taxes imposed on it.” His complaints are framed to present a case entitling him, as he supposed, to the equitable interposition of the court by way of injunction, and not for the purpose of deciding the abstract question as to whether the appellants were liable to taxation; which decision, if no relief was adjudged under it, could practically be of no benefit or advantage to the plaintiffs.

II. The argument is of no force in a case where the equitable jurisdiction of the court by way of injunction is invoked. It does not make out, nor do the complaints

Mutual Benefit Life Ins. Co. v. Supervisors of New York.

state, any case falling under any acknowledged head of equity jurisdiction. (*Heywood v. The City of Buffalo*, 14 *N. Y.*, 538). The uniform current of decisions in this state has always been to the effect, that a court of equity had no jurisdiction in cases such as these.

BY THE COURT.—LEONARD, J.—The question presented in this case has been passed upon by this court adversely to the plaintiffs (*Heyward v. City of Buffalo*, 14 *N. Y.*, 537). Assume, as the complaint alleges, that the assessment is illegal, the plaintiffs have or had at least two complete remedies at law. The assessment might have been reviewed and corrected by *certiorari*, or have been stricken from the roll by *mandamus*. These remedies are adequate for the plaintiffs' relief, as there is abundant authority to show, cited by the learned counsel for the respondents. Where there are such remedies fully adequate, the aid of a court of equity cannot be invoked.

The case principally relied on by the counsel for the appellants to maintain these actions was decided in 1863, since the judgment was rendered in the courts below, and is reported in 26 *N. Y.*, 303; *The People v. The New England Mutual Life Insurance Company*. That case was submitted on a statement of facts agreed on by the respective parties under section 372 of the Code. In the court below the tax was held to be legal, and judgment was rendered against the Company for the recovery of the amount. Upon an appeal to this court that judgment was reversed and the assessment held to be illegal. No objection was raised to the determination of the question. On the contrary, both parties asked the determination of the legality of the tax. In the cause at bar the objection is specifically raised, based upon the decisions of this court, that a court of equity will not take cognizance or grant equitable relief by injunction where full relief can be obtained at law. The appellants cannot be aided by the decision in 26 *N. Y.*, without overturning prior authority in this court in no respect inconsistent with that decision.

It has been held by the court that the act of 1853 (*Sess. L.*, chap. 463), for the incorporation of life insurance companies, and in relation to the agencies of foreign companies, repeals so much of chap. 51 of Laws of 1851 as required the deposit by

Short v. Knapp.

foreign companies of \$100,000 with the comptroller; but it is unnecessary to go into the merits of this question, inasmuch as it appears from the decisions that no relief can be administered in equity where the remedies at law are adequate for the attainment of justice.

The judgment appealed from must be affirmed, with costs.

SHORT *against* KNAPP

New York Common Pleas, General Term, January, 1867.

CAUSE OF ACTION FOR NEGLIGENCE.—CHARGE TO THE JURY.

The rule that one injured by the negligence of another cannot recover, if his own negligence contributed to the result, discussed, and its application determined in reference to injuries sustained by insufficient guards for horses on a ferry boat.

The proper terms of a charge to the jury in such a case.

Appeal from a judgment of the judicial court of the 7th District of New York.

The facts are stated in the opinion of BRADY, J.

Spring & Wetmore for the appellants.—I. The defendant is not liable as common carrier. (1) The responsibility of a common carrier, commences only from the time the goods *are delivered into his custody* in such a manner that he may exercise control over them. An acceptance of the goods, in some way, is indispensable to the liability of the carrier, and when no intention to commit the custody of the goods to the carrier appears, he will not be held liable. There must be such a delivery as vests in the carrier a special property in the goods, by virtue of which he might maintain an action against any one who disturbs his possession (*Angell on Car.*, secs. 140, 348,

465 ; *Cohen v. Frost*, 2 *Duer*, 335 ; *Blanchard v. Isaacs*, 3 *Barb.*, 388 ; *Tower v. Utica and Sch. R. Co.*, 7 *Hill*, 47 ; *Ad. on Con.*, 498). So held in case of a traveller who drives his horse and wagon on board a ferry-boat, pays the usual toll, selects a place for himself, and retains custody of his horse without committing it to the care of the ferry man, or expressing any wish or purpose to do so (*White v. Winnisimmet Co.*, 7 *Cush.* [Mass. R.] 154). [This case is directly in point, and precisely analogous to the present one.] The plaintiff retained his team in his own custody—selected his own position on the boat—did not call any of the deck hands or servants of the defendant, and commit his horses to their charge. The case presents the simple instance of a passenger retaining possession and control of his goods and so relieving the carrier from his responsibility as an insurer. (2) The responsibility of a carrier of animals is different from that of a carrier of inanimate property. The carrier is not responsible for injuries arising from the nature and propensities of the animal. (*Clarke v. R. & Syr. R. Co.*, 14 *N. Y.* [4 *Kern.*] 579). The defendant had a right to suppose that the owner of the horses would not drive them upon his boat if they were liable to become frightened at the noise of the machinery or the motion of the vessel. The plaintiff knew the disposition of his horses, or was bound to know it ; the defendant did not, and had a right to assume that they were gentle. At all events, if restive horses are placed upon the ferry-boat, the ferry man is entitled to due warning, in order that he may place the animals in particular custody of one of his servants.

II. No negligence was proved on the part of the defendant. The only imputed grounds of negligence were, that the deck of the ferry-boat was slippery, and the chain in the rear too low. (1) That the uncovered portion of the deck was slippery from falling fog and mist on a winter morning, is nothing. There is a portion of the deck of our city ferry-boats usually and necessarily unprotected from the weather. The covered portion of the defendant's boat, which included almost the whole deck, was dry. There were no other vehicles on the boat, and nothing to prevent the driver from selecting the dry part of the deck. If he had, according to his own story, the accident would not have happened. The defendant was under no obligation to keep *all* his deck dry. The structure of ferry-boats renders this

Short v. Knapp.

impossible, and a property owner might as reasonably be held responsible for allowing rain to fall upon his sidewalk. (2) There was no proof that the defendant's chain was weak, defective or unsuitable for the purpose such chains are designed to fulfil. There was no proof that it was different from the chain hung across all our ferry boats. There is no statute or ordinance making it imperative upon ferry men to provide any chain, and in the country such chains are unusual. The horses jumped the chain where it was at least two feet high—close to one of the posts where it was fastened. If higher it would allow children and smaller animals to go under it.

The ferry transit occupies but a few minutes—and the convenience of passengers requires that the chains should be arranged so as to allow a speedy exit from the boat. It is a universal custom upon our ferries that horses and carriages during the passage are looked after by some person in charge of them—and ferry men have a right to rely upon this fact, and are not bound to and could not provide a portable stable for them.

III. Even if any negligence could have been imputed to the defendant, the evidence discloses the grossest negligence on the part of the plaintiff. (1) It is an elementary principle of law that in an action for negligence the plaintiff must fail in his action unless it appears that he was free from *any* negligence contributing to the injury. "The *greatest* negligence on the part of the defendant will not cure the defect of the *least* negligence contributing to the injury on the part of the plaintiff." (Wilds v. Hudson Riv. R. Co., 24 N. Y. 430; Ernst v. Hudson Riv. R. Co., 24 How., 97; Button v. Hudson Riv. R. Co., 18 N. Y., 248; Wilkinson v. Farrie, Am. Law R., Feb., 1863.) "In an action for negligence the burden is upon the plaintiff to *prove* affirmatively that he is *guiltless* of any negligence proximately contributing to the injury." (Button v. Hudson Riv. R. Co., *ubi supra*.) It would be difficult to state a clearer instance of what the law defines as "gross negligence" than the *undisputed* facts of this case present on the part of the plaintiff, driving the carriage. It is unnecessary to discuss the question whether he was bound to use more than "ordinary" care. What would be ordinary care in handling sand bags would be gross negligence in hand-

Short v. Knapp.

ling bags of gunpowder, and what would have been ordinary care had the plaintiff's horses been standing in their stable was gross negligence when they were on the deck of a ferry boat. "Gross negligence" is the omission of such care as even an imprudent person would have taken under the circumstances; the plaintiff Short did not take the precautions that would have been taken by a boy of ten years of age. *It is not disputed* that he left his box, left the reins hanging over the dashboard, left his horses unattended, and either wholly entered the carriage or stood half in and half out in the doorway—it is unimportant which position he occupied—and then, as if his negligence were not then complete when his restive and unruly horses started the *first* time, and he had received full warning of the danger of leaving them longer, made no attempt to regain possession of the reins, but waited until their *second* flight, and they were in full career, and he had lost all power of regaining his control of them. Providentially, the lives of the passengers entrusted to his care were saved. Had they been lost can they be any doubt that the plaintiff would have been liable to their personal representatives? (2) The evidence of the plaintiff and others as to how high a runaway horse can jump and as to the probability of the plaintiff's having been able to stop the horses if he had been at their heads or had the reins in his possession, was purely a matter of opinion and idle conjecture, not a subject for testimony of experts, and should have been excluded. The exceptions to the general rule that the opinions of witnesses are inadmissible "are confined to questions of science, trade, and a few others of the same nature." (*Morehouse v. Mathews*, 2 *N. Y.* [2 *Comst.*], 514). The opinions of witnesses will not be received where "the inquiry is into a subject matter the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it" (1 *Smith Lead. Cas.*, 286; 1 *Phil. on Evid.*, 780; 1 *Greenl. on Evid.*, § 440; *Dewitt v. Barley*, 5 *Seld.*, 371; *Harris v. Panama R. Co.*, 3 *Duer*, 7; *Paige v. Hazard*, 5 *Hill* [5 *N. Y.*], 603; *Duff v. Lyon*, 1 *E. D. Smith*, 536).

IV. The question what constitutes negligence is one of law for the court. *Wilds v. Hudson R. R. Co.*, 24 *N. Y.*, 430; (see p. 433) [reversing, *S. C.*, 33 *Barb.*, 533]; *Morris v. Phelps*, 2

Short v. Knapp.

Hill, 33; *Keller v. N. Y. Central R. Co.*, 24 *How.*, 172; *Barmen v. Balt. & Ohio R. Co.*; *Am. Law Reg., N. S.*, Vol. 5. No. VIII [June 1866], 470; see p. 475. (1) This rule is stated and discussed at length in the leading case of *Wilds v. Hudson R. R. Co.*, (24 *N. Y.*, at page 433) in the court of appeals, and it is there held it is the duty of the court to take the case from the jury when questions of negligence are involved as in all others, not only when there is *no* evidence to sustain the allegation, but when there is *not enough* evidence to carry the case to the jury, and that "the applicability of the rule" is "*not varied* by saying that the evidence may consist of circumstances, from which *inferences* are to be drawn as to negligence; and that as different minds may draw different inferences from the same circumstances the jury must always be judges of negligence when the evidence is circumstantial."

It is unnecessary in the present instance to discuss the difficult question of precisely what amount of evidence is necessary to carry a case to the jury, or whether the facts lead to inferences for the jury to decide; it is universally admitted that when the facts are *undisputed* the court decides the legal inference from such facts, and the appellant claims in this case upon the *undisputed* facts. The only material conflict of testimony was as to whether the driver was wholly or partly in the carriage, which was simply as to whether he was guilty of one or another degree of folly and negligence.

The case was a proper one for a non-suit, which should have been granted. (2) The justice erred in refusing to charge as defendant's counsel requested. The jury in justices' courts may be left to decide both law and fact, but their decision as to the law is subjected to reversal; or if the justice attempts to charge them and charges erroneously, it is cause for reversal. In either case the present judgment should be reversed: if it included the question what constitutes negligence it was erroneous—if it was simply on the facts, the jury should have been differently instructed as to the law, and it is equally erroneous. (*Cowen's Justice*, 2d vol., p. 357; 3 *Johns.*, 436).

Alexander H. Reavey for the respondent;—Cited *Wedgw. Gov. & L.*, 275; *Dygert v. Bradley*, 8 *Wend.*, 469; *Keller*

Short v. Knapp.

v. N. Y. Central R. Co., 24 *How. Pr.*, 172; *Harring v. N. Y. and Erie R.*, 13 *Barb.*, 9; *Labar v. Koplin*, 4 *N. Y.*, 547; *Redf. on Railw.*, 333; *Clark v. Kirwan*, 4 *E. D. Smith*, 21; *Eakin v. Brown*, 1 *E. D. Smith*, 36; *Center v. Finney*, 17 *Barb.*, 94; 22 *N. Y.*, 209; 33 *Barb.*, 503; and 12 *Abb. Pr.*, 44; *Mudgett v. Bay State Steamboat Co.*, 1 *Daly*, 155).

BY THE COURT.—BRADY, J.—The plaintiff's horses, with carriage attached, were led by one of the plaintiffs, who was acting as the driver of the team, on board of the defendant's ferry boat, at the foot of Twenty-third street and the East river. There was no light upon the ferry gate or upon the boat. It was about half-past five in the morning, and very dark. The deck of the boat was slippery, although the driver who led the horses as stated did not notice that fact when he so led them on board. There were some persons in the coach, one of whom called to the driver, who went to the door of the coach to see what he wanted. While talking to him the whistle of the boat blew, and the horses started. The driver told them to stop, and they did so—they were not frightened. The whistle blew again, and the boat moving, caused the horses to start again. The driver hurried to them to stop them, and did all that he could do, but could not stop them, because the deck was slippery. When they started they turned round and went overboard, and one of them was drowned. There was a chain at the end of the boat, which sagged at the centre, and was not more than twelve inches high at that point, which was not sufficiently elevated to stop the horses, but did stop the carriage. The driver at the time the horses started, was talking to his passengers, having one foot on the step of the carriage, and one foot inside, and was apparently guilty of negligence in thus leaving his horses; but he testified that in consequence of the movement made by the horses, and the slippery condition of the deck of the ferry-boat, it would have been impossible for him to have stopped the horses whether he had been at their head or on his box; a fact to which others accustomed to manage horses also testified to, and corroborated his evidence on that subject. Several witnesses also testified in reference to the chain, its arrangement, sagging in the centre, and its in-

Short v. Knapp.

sufficiency for the purpose for which it was intended. The evidence given in behalf of the defendant, made a conflict upon the various elements of the plaintiffs' case; as to the elevation of the chain, the ability of a person to stop the horses if standing at their heads, the position of the driver when the horse started, and the condition of the deck. Under the circumstances disclosed, the plaintiffs' right to recover depended upon the absence of any negligence on their part which contributed to the injury sustained. The jury were so instructed. If the driver had been upon his box or standing at the head of his horses there could be no doubt about the right of the plaintiffs to recover, inasmuch as the horses were shown to be gentle and reliable, obedient to command, and not inclined to run away and there was proof establishing the facts that the guards used by the defendant on his boat were not sufficient for the purpose intended—that there was no place to tie the horses and no proof that any person was employed on board of the boat who was charged with the care or custody of these or any other horses. Assuming this conclusion to be correct in principle, it follows that if the driver being on his box or at the heads of the horses could not have arrested them, his absence from both the places designated was not *per se* evidence of negligence contributing to the injury suffered.

The facts and circumstances were considered and passed upon, and if the jury thought the plaintiffs guilty of negligence, they could not recover. For these reasons the justice did not err in refusing to dismiss the complaint.

It does not follow because the plaintiffs may have been guilty of negligence that they cannot recover. The negligence must in some degree contribute to the injury, and unless it does, it cannot affect the right to indemnity. (*Haley v. Earle*, 30 N. Y., 208). Although the liability of a common carrier of animals is not in all respects the same as that of a carrier of inanimate property, and although he is not an insurer against injuries arising from the nature and propensities of animals, yet if diligence and care can prevent them he is bound to the exercise of such diligence and care (*Clarke v. The Roch. & Syr. R. Co.*, 14 N. Y. [4 Kern.], 570. "It is the duty of a ferry company to have all suitable and requisite accommoda-

Short v. Knapp.

tions for the entering upon the safe transportation while on board, and the departure from the boat of all horses and vehicles passing over such ferry. They are also required "to be provided with all proper and suitable guards and barriers on the boat for the security of the property thus carried, and to prevent damage from such casualties as it would naturally be exposed to though there was ordinary care on the part of the traveler (per DEWEY, J. in *White v. The Winnissimmet Co.*, 7 *Cush.*, 157). Accepting this statement of the duties devolving upon ferry companies as a concise and ample exposition of them in reference to the subject under consideration, and more particularly since the case from which it is extracted was cited by the defendants' counsel, it is established by the verdict of the jury that the defendants' boat had not suitable guards and barriers to prevent damages from such casualties as the plaintiffs' property would naturally be exposed to. It is true that the plaintiff did not recover in the case just referred to, but it was for the reason that he had contributed to his injuries by his own negligence. The opposite finding on conflicting evidence sustains the judgment in this case, the jury having been instructed by the justice not only in relation to the plaintiffs' negligence but also that the defendants were not liable unless the damages sustained by the plaintiffs were occasioned by the defendants' negligence; upon an examination of the case in reference to the propriety of the verdict we cannot say that it was not just. It appears clearly that the plaintiffs' horses were frightened by the act of the defendants' servant who blew the whistle, and that defendant was therefore in fact the original impelling cause of the accident; whether the use of the whistle did not impose additional caution on behalf of the defendants, is a question upon which we are not called upon to express an opinion; but if such use of it is necessary in conducting the business of the ferry in the navigation of its boats, it would seem from the events which this case has proven, to call upon the defendant to employ ampler means for the security of passengers and animals than those adopted.

We cannot interfere with this judgment. The evidence admitted under the defendant's objection bore directly upon the question of negligence, and was pertinent and proper, and

People v. Hudson River R. Co.

the jury were properly instructed upon the legal rules by which their deliberations were to be governed.

The judgment should be affirmed.

DALY, F. J.—I agree with Judge BRADY that this judgment should be affirmed. It was a question of fact, under the evidence, whether the driver did or did not enter and seat himself in the coach. Even if he had done so, it is doubtful whether that act contributed to or co-operated in producing the accident, as several experienced witnesses testified that if he had been on the box, or at the horses' heads, it would have been impossible for him to have prevented it. The judge, therefore, could not, under this evidence, instruct the jury that such an act constituted in law, an act which contributed to the injury.

THE PEOPLE and the BROADWAY RAILROAD COMPANY *against* THE HUDSON RIVER RAILROAD COMPANY.

New York Common Pleas; General Term, December, 1866.

INJUNCTION.—RAILROAD CHARTER.

Under the charter of the Hudson River Railroad Company (*Laws of 1846, 272*), which authorizes the company to construct a road with such branches for depot and station accommodations as may be required, and by a subsequent provision declares that the road in the city of New York may be located on or westerly of Eighth avenue or Hudson street, but shall not infringe on the privileges of the Harlem Railroad by running nearer to it than the Eighth avenue and Hudson street—the company are not entitled to continue the road or run a branch from the end of Hudson street turning easterly to Broadway.

An injunction lies to prevent such an extension of the track.

Appeal from an order granting an injunction.

The facts appear in the opinion of the Court.

People v. Hudson River R. Co.

The resolution passed by the board of aldermen and the board of councilmen of the city of New York, December 20th, 1864, and approved by the mayor the same day, was as follows: "*Resolved*, That the Hudson River Railroad Company be and they are hereby permitted to extend their tracks from Chambers street through College Place and Warren street to Broadway, for the use of their city cars, and to lay a side track in Hudson street from Canal to Chambers street, and turn-outs in front of their depot property in Twenty-ninth and Thirtieth streets, and also to extend their Eleventh Avenue tracks to connect with their Tenth Avenue tracks through Fourteenth street."

Thomas M. North and *Charles A. Rapallo*, for appellants.

J. H. Martindale, Attorney General, *A. R. Lawrence, Jr.*, and *H. W. Robinson*, for the respondents. I. The defendants, the mayor, aldermen, and commonalty of the city of New York have no power, either by resolution or ordinance, to grant to a corporation or an association of persons the right to maintain and construct a railway in one of the streets, for the transportation of passengers for private gain, and a resolution of the common council granting such a right, is void (*Milbau v. Sharp*, 27 *N. Y.*, 611; *Davis v. The Mayor, &c.* 14 *N. Y.*, 506; *People v. Kerr*, 27 *N. Y.*, 188). It is clear, then, that the resolution of December 20, 1864, is void, unless some special statutory authority can be found by which the Legislature have—as far as the defendants, the Hudson River Railroad Company, are concerned—delegated to the corporation of the city such right.

II. The only special statute which affects this case is the act of May 12, 1846, entitled "An Act to authorize the construction of a railroad from New York to Albany (*Laws of 1846*, p. 274). From the statute it is obvious that the defendants, the Hudson River Railroad Company are prohibited from locating their railroad on any of the streets or avenues which are eastward of the Eighth avenue or Hudson street—that they cannot make even this location without the permission of the corporation, and that to make the prohibition still more imperative, the Legislature have directed that they should not run their track

People v. Hudson River R. Co.

nearer to the track of the Harlem company than the Eighth avenue and Hudson street.

Again: the corporation of the city are only authorized to give a permission to the railroad company to run on streets which include or are westerly of the Eighth avenue or Hudson street. To that extent, but no further, are the powers of the corporation enlarged. Without the action of the Legislature they would have had no power over the subject (cases *supra*). It appears from the complaint that College Place and Warren street and Broadway lie south-easterly or easterly of the line of the Eighth avenue and Hudson street, and nearer to the track of the Harlem company than the Eighth avenue and Hudson street (*Ib.*) The resolution of December 20, 1864, is therefore simply void.

III. The proviso contained in the fifth section of the act of 1848 (*Laws of 1848*, p. 43), does not aid the defendants, nor affect the question presented by the papers in this case, because the location of a track easterly of the Eighth avenue or Hudson street would not be lawful with or without the assent of the corporation of the city of New York.

IV. The resolution is also void because it is in violation of the charter of the city of New York, and of the acts of the Legislature of 1854 and 1860, referred to in the complaint (*Laws of 1850*, p. 323; *Laws of 1860*, p. 16).

V. The railroad tracks laid down by the defendants, the Hudson River Railroad Company, being an unauthorized obstruction of a public street or highway, constitute a public nuisance (*Davis v. The Mayor, &c. of New York*, 14 *N. Y.*, p. 506). As such, their continuance can be restrained, and their removal ordered at the suit of the people (*Attorney General v. Cohoes Co.*, 6 *Paige*, 133; *People v. New York & Harlem R. Co.*, 26 *How.*, 53; *Davis v. The Mayor, &c.*, 14 *N. Y.*, 526, and cases cited).

VI. The complaint shows that the tracks in question are specially injurious to the plaintiff, the Broadway and Seventh Avenue Railroad Company—that they interfere with the prosecution of their business, and affect their gains and emoluments. Those plaintiffs are therefore entitled to the relief which they ask in this action (*Milhan v. Sharp*, 27 *N. Y.*, 612; *Doolittle v. Supervisors of Broome*, 18 *N. Y.*, 160; *Corning v. Lawrence*, 6 *Johns. Ch.*, 49).

VII. The pretence set up that the branch road constructed from the west side of Church street east to Broadway, was by way of station accommodation, is a mere apology for a violation of a prohibition of the statute. No necessity existed, even if the station accommodations were required, of running tracks in that direction instead of running them to the west, and keeping within the letter and plain intent of the statute. The necessity which would justify such a proceeding as within the intent of the statute, though contrary to its letter, must be extreme and overwhelming, and the defendants presented no such case.

By THE COURT.*—DALY, F. J.—An injunction was granted in this case restraining the defendants from extending the track of their railroad through Warren street to Broadway.

It is very clear that the defendants have no authority to do so unless it is conferred upon them by their act of incorporation (*Millhau v. Sharp*, 27 *N. Y.*, 612; *Laws of N. Y.*, 1864; § 323; *Laws of N. Y.*, 1860, § 16).

By the first section of the act (*Laws of N. Y.*, 1846, p. 272) they are authorized to construct a railroad between the cities of Albany and New York, commencing in the city of New York, the consent of the city being obtained, with power to construct such branch or branches for depot and station accommodations as may be required for the business of the road, and the fourth section of the act declares that the road may be located on any of the streets or avenues of the city of New York *westerly* of and including the Eighth avenue, and on or *westerly* of Hudson street, *provided*, the assent of the corporation of the city be first obtained for such location; but that the defendants shall not infringe upon the rights or privileges of the Harlem Railroad Company by using any track or line of the road contiguous to or alongside of their track, nor by running nearer to it on the Island of New York than the Eighth avenue and Hudson street.

The power to construct branches for depot or station accommodation is, as respects the city of New York, limited to the space designated by the act, as that within which the railroad may be located in the streets or avenues of the city, that

* Present, DALY, BRADY, and CARDOZO, JJ.

People v. Hudson River R. Co.

is, on or *westerly* of the Eighth avenue or Hudson street, and the limit of Hudson street is, I think, fairly designated by the act as the point of commencement, or it may be that branches may be extended for depot or station accommodation beyond that, *westerly* of such a line as would exist if Hudson street were continued on the same parallel as at present to the river.

That this is the fair construction of the act, and was the obvious intention of the Legislature, I entertain no doubt. The construction for which the defendants contend would entitle them, whenever they thought their business required it, to run branches through any part of the city below Chambers street, the narrowest, the most crowded with vehicles, and the most essential for business purposes of any part of the city, which could never have been, in my judgment, the design of the Legislature in the enactment of this provision. Nor does the limitation of the defendants' route in the city depend upon the consent of the Harlem Railroad. The prohibition against running nearer to that road than the Eighth avenue or Hudson street is merely re-affirmatory of the previous clause in the act prescribing the limitation of the defendants' route. The complaint avers that the track laid down by the defendants without authority interferes with the track of the plaintiffs, and affects their interest, which is sufficient to entitle them to come into a court of equity and ask for the injunction.

The injunction was properly granted, and the order made at the special term should be affirmed.

Ordered accordingly.

 Madison Av. Bap. Ch. v. Bap. Ch. in Oliver st.

11 Abb. Pr. N. S. 132, 46 N. Y. 131, 109.

THE MADISON AVENUE BAPTIST CHURCH *against* THE
BAPTIST CHURCH IN OLIVER STREET.

New York Superior Court; Special Term, January, 1867.

RELIGIOUS CORPORATIONS.—PETITIONS;—ORDERS.

In a proceeding for a sale of the property of a religious corporation, allegations that the income of the society was not sufficient to pay their liabilities or meet current expenses are sustained by proof that the current expenses, including interest due by the terms of bonds issued by the society, though not called for by the bond holders, are in excess of receipts.

The jurisdiction of the court does not depend on the question whether the committee were appointed by the corporators, if it be shown that the corporators, at a corporate meeting ratified the action of such committee.

To constitute a corporate meeting of a religious society it is not necessary that a majority be present. If the meeting is regularly held, those present constitute a quorum, and a majority of them can pass a resolution.

The presence of strangers will not vitiate the proceedings unless they voted and their votes were necessary to carry the resolution.

What is sufficient evidence of the number of corporators.

A mistaken statement in a petition,—*held* not ground for avoiding the order made thereon.

Trial by the Court.

The former proceedings in this action are fully reported in 19 *Abb. Pr.*, 105, where the decision at special term, upon the first trial, is given, and in 1 *Abb. Pr.*, N. S., 214, where the decision at general term, reversing the former decision, is given.

C. C. Langdell and *James T. Brady*, for the plaintiffs.

Wm. R. Martin, *Wm. F. Allen*, and *L. B. Woodruff*, for the defendants.

JONES, J.—Upon a former trial of this action, there were four objections raised to the order made by the Supreme Court, authorizing the conveyance by plaintiffs to defendants of the property in question. Those four objections were: First. That the court had the power to order only a sale. Second. That the application was made by the trustees and not by the cor-

 Madison Av. Bap. Ch. v. Bap. Ch. in Oliver st.

poration. Third. That the order did not direct the application of the money arising from the sale. Fourth. That the transaction produced a dissolution and abandonment of the plaintiffs' corporation, and not a continuance of it for the purposes of its organization. The justice, before whom the former trial was had, held these objections to be valid, and excluded evidence of such supreme court proceedings. Judgment was consequently rendered for plaintiffs. Upon an appeal from such judgment, the general term held that each one of said four objections was untenable, reversed the judgment, and ordered a new trial, on the ground that error was committed in not admitting in evidence the record of the supreme court proceedings. The new trial thus ordered came on before me. The general term has decided that the allegations in the petition, if true, are sufficient to give the supreme court jurisdiction and authority to make the order in question. On the trial before me, however, plaintiffs introduced testimony with the view of showing that divers of the allegations of the petition were untrue, and claimed that if these allegations were untrue, the supreme court obtained no jurisdiction. The allegations, respecting which evidence was given, are—First. As to the inability of plaintiffs' corporation to pay the liabilities, or meet the current expenses of the church. Second. As to the plan or terms of the projected union being agreed on by a joint committee appointed by the *corporate bodies* respectively. Third. As to whether there were a sufficient number of corporators present at the meeting of September 29, 1862, to make the action of that meeting binding. Fourth. As to there being twenty-eight pew owners and thirty-nine pew hirers. Plaintiffs claim that the allegations of the petition in these respects are untrue. I will examine the proof.

First. The current expenses of the church were, \$4,800.00
Interest on the mortgage debt, 4,235.00

Receipts from all sources,

\$9,035.00
5,900.00

\$3,135.00

In addition to this, there were liabilities not secured by mortgage, (some of them in litigation,) amounting to about

\$12,000.00

Madison Av. Bap. Ch. v. Bap. Ch. in Oliver st.

Thus we have an annual excess of current expenses over receipts of \$3100, and liabilities, (not secured by mortgage), amounting to \$12,000. There was no income to meet this excess, and pay off this liability. There were no funds, and no resources, other than a resort to a sale or mortgage of the church edifice, wherewith to provide for the payment of the liability, and for the keeping down of this excess. Under this state of facts, I think it may well be said, in the language of the petition, "that they are unable to pay their liabilities, or meet the current expenses of the church." There is no doubt that, by a sale of the church property, funds sufficient to meet the liabilities could be obtained. One of the objects of the application was, by the union of the two churches, the conveyance of the plaintiffs' property, to defendants, and the bringing in of the defendants' property, to provide for the payment of these liabilities, and so to increase the prosperity of the united church as that the current receipts would keep down the current expenses, including therein interest on the mortgage debt. The petitioners do not say that their property, if thus sold, would not be sufficient to discharge their liabilities; all they say is that their receipts and income are insufficient, either to provide for the payment of their liabilities, or to meet current expenses. I think the proof sustains this allegation. Indeed, if they kept on for a period of years, running behind in their current expenses and interest account, at the rate \$3000 a year, the result would be that, after a while, the proceeds of a sale would not discharge their liabilities. The plaintiffs claim that as a great part of an indebtedness of \$18,000 is held by members of this church, who have not called for interest, such interest cannot be regarded as a liability. This indebtedness is however secured by bonds bearing interest on their face. The holders have never released their right to claim interest, and can any time call for payment of current as well as back interest.

Second. The evidence shows that the committee appointed by plaintiffs to confer with a committee of defendants was not appointed by the *corporate body*. I do not, however, perceive that the jurisdiction of the court depends in any degree on this allegation. The only question, in this respect, is whether at a corporate meeting the plaintiffs' corporation adopted and ratified the action of its committee. If so, then

the matter stands as if the plan of union had, without the intervention of a committee, been proposed in the first instance at such corporate meeting and then adopted. The plan in question was adopted at a legal corporate meeting of plaintiffs' corporation.

Third. Was the action of that meeting binding? There were but twenty corporators present at that meeting, far less than a majority of all the corporators. The plaintiffs claim that to constitute a corporate meeting, whose acts and resolution shall be binding, there must be present at least a majority of all the corporators. I think not. Where the corporators are indefinite, as in this case, then such of them as assemble pursuant to regular call, will constitute a quorum for the transaction of business, and a majority of said quorum can pass a resolution. It is objected that some persons were present at the meeting who were not corporators. That fact will not vitiate the proceedings of the meeting unless it appears that such persons voted, and their votes were necessary to carry the resolutions which were passed.

Fourth. The evidence sustains the allegation that there were but twenty-eight pew owners. As to whether there were more than thirty-nine pew hirers, does not satisfactorily appear on the evidence. The records of the church seem to have been loosely kept, inasmuch as no record of pew owners or of pew hirers, containing appropriate data as to when the parties became such owners and hirers, and as to when they ceased to be such, was produced in evidence. The evidence as to the number of pew hirers consists in the recollection of witnesses, aided by entries of payments for pew rents, giving the dates and amounts of the payments, with the number of the pew, and the name of the person paying, without indicating for what period of time the payments were made. I think this evidence is insufficient to overcome the statement in the petition, verified by the president and secretary of the board of trustees, at a time when the facts must have been fresher in their minds than they could possibly have been in the minds of the witnesses at the trial.

Whether the number of pew hirers was thirty-nine or fifty-two is not important, since the allegation as to consent of the pew hirers may be stricken out of the petition without affecting the jurisdiction of the court. A great amount of evidence was taken as to the number of the corporators of plaintiffs' corpora-

tion. I have deemed it unnecessary to determine the number, for, although it may be that a majority of the whole of the members did not affirmatively authorize the proceedings, yet the evidence does not show that more than four or five objected. If I am right in my view that the resolution of the meeting of September 29th was ample authority for the trustees to make this application, then the trustees having, under that authority, passed a resolution directing the application to be made, it is unnecessary to show an authority by a majority of the whole number of corporators. If it appeared that a majority of the whole number objected to the application being made, then other questions would arise, which it is now unnecessary to discuss.

I have thus considered all the grounds, arising out of the evidence *dehors* the supreme court record, upon which it is claimed that that court has no jurisdiction, and have come to the conclusion that the claim of no jurisdiction is untenable on any one or all of such grounds. Plaintiffs' counsel, however, claims that the insertion, in the petition, of the allegations just considered, operated as a fraud on the supreme court, and, therefore, the order in question was void. The evidence before me establishes the truth of all the allegations except two. One of these two is the allegation as to the number of pew hirers. On this I have held that the evidence is too unsatisfactory for me to decide against the truth of the petition. The other is the allegation that the committee appointed by the plaintiffs was appointed by the corporate body. The evidence shows a committee was appointed by plaintiffs; that said committee conferred with a committee appointed by defendants, and agreed on the plan in question. It was a mere mistake, and perhaps an error of judgment, in stating that the committee was appointed by the corporate body. The mistake is too immaterial to justify a holding that, by reason thereof, the order is void as having been obtained by fraud. There certainly was no fraud intended, and, so far as I can see, no actual or legal fraud has been shown. Entertaining these views, it is not necessary to consider whether, after a party has acted in good faith upon an order made by a court upon the application of the trustees of a corporation, such corporation can claim the order to be void by reason of its trustees having committed a

Barlow v. Barlow.

fraud on the court; or the more general question, whether one court has any right to hold the judgment or order of another court to be null and void be reason of a deceit having been practised on that court, or, if they have any such right, then, under what circumstances, or in whose favor, it is to be exercised.

Judgment for defendants, with costs.

BARLOW *against* BARLOW.

Supreme Court, Second District; General Term, May, 1863.

HUSBAND AND WIFE.—LIMITED DIVORCE.

The act of a husband in angrily expelling his wife from home, under suspicion of her unfaithfulness,—*Held* not sufficient to sustain a charge of abandonment as a ground for granting a limited divorce under the statute.

Appeal from a judgment.

This action was brought by a wife for a separation, from bed and board, under the statute. The facts established are stated in the opinion of the court. Judgment for the plaintiff having been entered, the defendant appealed to the court at general term.

Henry Whittaker, Jr., for the appellant.

Joseph M. Pray, for the respondent.

BY THE COURT.—SCRUHAM, J. The judgment of separation in this case was founded solely upon the ground of abandonment, and it is only necessary that we determine whether the facts disclosed by the pleadings and evidence are such as constitute sufficient cause for a separation on that ground.

It is not, under our statute, sufficient to show that the husband has abandoned the wife, but it must also appear that he has either refused or neglected to provide for her.

Barlow v. Barlow.

Regarding the marriage contract as stable and sacred, our law does not favor separations between husband and wife, and to justify a judgment for limited divorce on the ground of abandonment, such circumstances must appear as manifest a settled and determined purpose in the husband to withdraw from the wife permanently his society and protection, and to withhold from her the means necessary for her support.

In this case the defendant called on the plaintiff's father on the 24th July, 1861, in a state of excitement, and told him that he must take his daughter home immediately, as she had been guilty of adultery, and he would not live with her longer, or contribute to her support, and afterwards, in the evening of the same day, the witness Grey found the plaintiff and defendant at their house in a great state of excitement, and it is upon his testimony of what then occurred that the charge of abandonment is founded. He testifies in that respect as follows: "He at first refused to let her take her clothes; he finally consented she could take them if he could inspect them; while she was preparing the clothes defendant and I were in the parlor; when she got ready to leave the house she came down into the parlor, and, as she came in the door defendant got hold of her hand and got down on his knees and dragged his little boy down with him, and says 'Before you go, Mary, confess to this thing and destroy one,' and appealed to her by her dead child in Heaven. She said, 'Nicholas, I am not guilty and you know it.' He immediately jumped from his knees and jerked up his boy and pointed to the door, and said, 'Go then!' and as she and I were going out of the door, he said he would never live with her again. He said during the evening he would never give her any more support, nor give a penny for her expenses; that he would rot in jail first.

It is evident that the defendant was at this time under great excitement, and when it is considered that he had two or three weeks before accused her of the same offence and made the same declarations, and yet continued to live with her and support her, and that the parties fully cohabited as man and wife for weeks after such charge and declarations, his conduct on the evening of the 24th July should be regarded as proceeding from temporary excitement and anger rather than as conclusively

Zinn v. Ritterman.

indicating a fixed and settled purpose to abandon her. To fix upon it such a character in view of the previous occurrences to which I have alluded, something more should have been shown; as that the defendant had subsequently refused to receive the plaintiff or to contribute on demand to her support, or that a considerable period had elapsed during which he had neglected to supply her with necessaries or funds. No such circumstance appears, but within a week from the time she left the defendant's house the plaintiff verified her complaint in this action, and caused the summons to be served within three days thereafter. The period was too short to render it incumbent upon the defendant to tender funds for her support, especially as he knew that she was with her relatives.

There is no evidence that he neglected or refused to furnish her with necessaries while they were living together. The direction to the milkman 'never to leave any milk at the house except what he got money for,' does not prove that milk was not provided, or that the defendant discharged the milkman."

The judgment should be reversed, and a new trial ordered, without costs of this appeal.

ZINN *against* RITTERMAN.

New York Superior Court ; Special Term, January, 1867.

ARREST.—ELECTION OF REMEDIES.

The election by the creditor to affirm the contract as to part of the claim only, is not sufficient to deprive him of the right to sue for fraud in the contract as to the remainder of the claim.*

An unliquidated claim for damages arising out of a tortious act is not to be regarded as a debt within the provision of the statutes authorizing the discharge of insolvent debtors.

Motion to discharge order of arrest.

* Compare *Wright v. Ritterman*, 1 *Abb. Pr., N. S.*, 428; *People v. Kelly Id.*, 432.

The facts are stated in the opinion of the court.

E. T. Gerry, for the motion.

T. B. Eldridge, opposed.

BY THE COURT.—MONELL, J. This action is to recover damages for a fraudulent representation made by the defendant to the plaintiffs concerning his responsibility and property, by means of which the plaintiffs were induced to sell and deliver merchandise to the defendant of the value of five thousand seven hundred and eighty-eight dollars and fifty-nine cents.

Before the bringing of this action the defendant applied by petition to the city judge under the provisions of the act to discharge from imprisonment, and obtained his discharge, which by the statute, exempted his person from imprisonment by reason of hnp“ debt ” due, &c.

The defendant having been arrested, and held to bail in this action, a motion is now made for his discharge on the ground that the discharge granted by the city judge exempts the defendant from imprisonment. It appears on this motion that an action was brought in the supreme court to recover some one thousand five hundred dollars of the debt, but which action was discontinued before the commencement of the action in this court.

The election to *affirm* the contract as to part of the claim only, is not sufficient to deprive the plaintiffs of the right to sue for the fraud as to the remainder of the claim, and, therefore, it is not necessary to examine as to the effect of such affirmance. In respect to a large part of the claim now sought to be recovered as *damages*, there was no election to affirm the contract, and therefore, as to that part, the discharge does not operate, unless it was a “debt” within the meaning of the statute. I am not aware of any case where it has been held, that an unliquidated claim for damages, arising out of a tortious act, was a *debt*, so as to be embraced within the provision of the insolvent debtors’ act. In all the cases to which I was referred by the defendant’s counsel, the claim for damages had gone into judgment previous to the discharge being obtained; and they held, and very properly, that the amount recovered and merged in the judgment was a debt within the statute. A debt imports a sum of money

arising upon a contract express or implied (3 *Black. Com.*, 154), and not a mere claim for damages.

That the statute does not extend to actions for torts, or to actions where damages unliquidated, is decided, I think, in a large number of cases (see *Frost v. Carter*, 1 *Johns. Cas.*, 73; *Mechanics' &c. Bank v. Carter*, 15 *Johns.*, 467; *Strong v. White*, 9 *Johns.* 161; *Kennedy v. Strong*, 10 *Id.*, 289; *S. C.*, 14 *Id.*, 128; *Hodges v. Chase*, 2 *Wend.*, 248).

Kennedy v. Strong, was an action of *trover*, and *Hodges v. Chase*, was *trespass*; and it was held in each case, that there was not a debt, and that the insolvent's discharge did not operate.*

Assuming, as I must that the law is settled in this State against the view entertained by the defendant's counsel, it follows that the discharge granted by the city judge did not operate to relieve the defendant from imprisonment for the claim for damages sought to be recovered in this action. Upon the merits of this application, the evidence is too strong to be resisted, that the defendant was guilty of a fraud. The representations proven to have been made when he purchased the goods, are shown to have been false; and the defendant has failed to satisfy me, that he was innocent of any intent to defraud the plaintiffs. All, or nearly all, of the subsequent acts of the defendant, tend to confirm the allegation, that when he made the purchases he had formed a deliberate design to cheat; and I am satisfied from all the proofs before me that such was his design.

The motion to discharge from arrest must be denied.

* To the same effect is the case of *Cotton*, 2 *N. Y. Leg. Obs.*, 370, in which it was held by the United States District Court, that, under the Bankrupt act of 1841, which mentions simply "debts," a judgment for the payment of an allowance to support a bastard child, and a judgment for damages for seduction are not within the act, the court holding that even a judgment which is in form a debt, and recovered in a civil proceeding, is not "a debt" within the act, if the cause of action were a violation of duty, or a tort.

To the contrary effect, however, is matter of *Comstock*, 22 *Vt.*, 642, and *Book's case*, 3 *McLean*, 317.

Compare as to the effect of judgment, *Crouch v. Gridley*, 6 *Hill*, 250; *Kellogg v. Schuyler*, 2 *Den.*, 73; *Spalding v. People*, 7 *Hill*, 301.

It is settled in this State by *Campbell v. Perkins*, 8 *N. Y.* [4 *Seld.*], 430, that where, as in the case of an action against carriers for a breach of their duty, the cause of action is founded upon a contract or engagement, the plaintiff cannot elude the effect of a discharge by bringing an action sounding in tort.

Fettrich v. Totten.

FETTRICH *against* TOTTEN.*New York Superior Court ; Special Term, January, 1867.*

MECHANICS' LIEN.

A Mechanic's lien, filed under the statute, can only be discharged in one of the modes prescribed by the statute.

The court has not the power to discharge the lien before the lapse of a year, and without proceedings taken under the statute.

Motion to discharge a mechanic's lien.

The action was brought by William Fettrich, as receiver, against Richard Totten.

The facts are stated in the opinion of the court.

Mr. Darlington, for the motion.

Mr. Bright, opposed.

MONELL, J. On the 27th of March, 1866, John Fettrich filed with the clerk of this county a mechanic's lien against the defendant William Totten, on *six* houses on Fifty-fifth street, for two thousand and two hundred dollars; alleged to be due from the defendant on contract for furnishing brown stone for such buildings. On the 9th of May, 1866, the defendant, for the purpose of discharging the lien from his property, deposited the amount claimed with the clerk of the county. In August, 1866, William Fettrich having been appointed receiver of the property of the firm of Irvin & Co. (comprised of James Fettrich John Fettrich, Anthur Irvin, and Peter Algie), commenced an action in this court against the defendant, Richard Totten, to recover a sum of two thousand one hundred and seventy-six dollars and twenty-five cents alleged to be due upon a contract, or contracts between said Irvin of Irvin & Co., and Richard Totten for furnishing his brown stone for five houses of the defendant on Fifty-fifth street. That suit is now pending.

A motion is made in such action for an order requiring the clerk of the county to pay to the defendant the sum of two thousand

*Monell
5 July, 1867.*

Fettrich v. Totten.

two hundred dollars deposited by him to discharge the mechanic's lien. And it is alleged on this motion that more than six months have elapsed since the filing of such lien, and that no steps whatever have been taken by John Fettrich, the defendant, to close the lien. And it is also alleged that the arrest by the receiver is to recover the same debt for which the mechanic's lien was filed. And it is therefore insisted that the institution of the suit was a waiver of the lien.

I do not see how this motion can prevail. The eleventh section of the mechanic's lien law provides the only modes in which the lien may be discharged. One of these is by an entry of the clerk made in the book of liens, that a *year* has elapsed since filing the lien, and that no notice has been given to him of legal steps to enforce the lien; and another made is by an affidavit stating that thirty days have elapsed since notice was given to the claimant to close the lien, and that the necessary proceedings on his part to do so have not been taken. Neither has a year expired since filing the lien; nor has notice to close the lien been given to the claimant. Hence none of the proceedings, provided by the statute for discharging the lien, have been taken.

I am of opinion that the lien can be discharged only in one of the modes provided by the statute. The whole proceeding is a special one, and such remedies only as are given by the statute can be pursued. A lapse of one year without proceeding, discharges the lien; and a more speedy mode of testing its validity may be had by a notice to the claimant to close his lien. I do not think the court has the power to discharge the lien, and, therefore, it follows, that the bringing a suit (assuming it to be for the same debt, and a waiver of the lien) could not of itself authorize the court to order the lien to be discharged. If so, there clearly is no power to order the money deposited in lien of the lien to be paid to the defendant.

The motion is denied.

ROSS *against* THE MAYOR, &c., OF NEW YORK.*New York Superior Court ; Special Term, November, 1866.*

REFERENCE.—LONG ACCOUNT.

An action on the statute to recover from a city or county the damages incurred by the plaintiff from a mob or riot, though involving a large number of items of damage, is not an action involving the examination of a long account, and, therefore, cannot be ordered to a reference without consent of parties.

Motion by the plaintiff to refer the cause.

Mr. Parsons, for the motion.

R. O'Gorman, opposed.

MONELL, J.—This is an action to recover damages for the destruction of property by rioters, in July, 1863. The trial of the action will require the examination of a large number of items of property injured or destroyed, the value of which constitutes the damages the plaintiff seeks to recover; and it is claimed that such a large number of items constitutes an account, and renders the action, therefore, a referable one.

The language of the Code of Procedure and of the Revised Statutes, in respect to the referability of actions is the same; and a compulsory reference can be ordered only where the trial will require the examination of a long account; and, according to all the cases, "account" must be taken in the ordinary acceptance of the word. Under the Revised Statutes it was uniformly decided that actions for torts were not referable (*Silmsen v. Redfield*, 19 *Wend.*, 21; *Dederick v. Richley*, *Id.*, 108). And even in covenant, a reference was not allowed, where mere items of damages were to be examined (*Thomas v.*

Reab, 6 *Wend.*, 503). Under the Code of Procedure the decisions are as uniform ; and I have not been able to find any case holding that actions for torts can be compulsorily ordered to a reference. I was referred, on the argument, to several cases which, it was supposed, favored the reference of actions like the one in question ; but I do not find, upon examining those cases, that they in any degree sustain the plaintiff's motion.

In *Keeler v. Poughkeepsie and Salt Point Plank Road Co.* (10 *How. Pr.*, 11), the action was upon a contract for constructing a plank road, and there being a long account, the action was clearly referable. *Mills v. Thursby*, No. 1 (11 *How. Pr.*, 113), and *Jackson v. De Forest* (14 *Id.*, 81), were cases of partnership accounting and expressly within the letter of the statute. *Atocha v. Garcia* (15 *Abb. Pr.*, 303), was also on contract. I was also referred to some cases on insurance policies, which were held to be referable. Without stopping to distinguish between such actions, and such as seek to recover damages for injury to, or destruction of property, it is enough that the power to refer insurance cases is much doubted (*McLean v. East River Ins. Co.*, 8 *Bosw.*, 700), and has been allowed only when no issue besides the ascertainment of the value of the property injured or destroyed, remained to be tried (*Samble v. Mechanics' Ins. Co.*, 1 *Hall*, 56). Whereas, it has frequently been decided since the Code, that actions for wrongs, or actions not arising on contracts, cannot be compulsorily referred. In *Sharp v. The Mayor, &c., of New York* (9 *Abb. Pr.*, 426), the action was by the lessee of a ferry to recover damages for alleged failure of defendants' title. Judge CLERKE says : " Compulsory references should be rigorously confined to cases invoking the examination of a *bona fide* account, in an action of contract." *McMaster v. Booth* (3 *Code R.*, 111 S. C. ; 4 *How. Pr.*, 427) was to recover damages for injury to property, caused by the defendants' negligence. The property consisted of a large number of planes, and a great number of tools. A reference was refused. (*Derry v. Field*, 13 *How. Pr.*, 437), was against a sheriff for a false return to an execution. It is there said, " Examination of numerous items of damage does not constitute an account between the parties, within the meaning of that term." And Mc-

ROSS v. Mayor of New York.

Cullough v. Brodie (*Id.*, 346), was an action for damages for false representations; and it was said, "when the items to be investigated are made the subject of examination, in order to recover damages strictly and properly so called, either party has a right to have the issues tried by a jury."

It will be seen, therefore, that the current of decision is in opposition to the power of the court to make compulsory reference of actions brought to recover damages not arising out of contract, even although the items of damages which are to be examined be ever so numerous.

This action is brought under the act of 1855, which renders the corporation liable for damages, for destruction of or injury to property, by a mob; and, although, in ascertaining the plaintiff's damages, a long and probably tedious examination of the extent of the injury and value of the property must be had, yet the case does not fall among such as the court has the power, without the consent of parties, to order to a reference. I regret that it is so. Not only might much time of courts and juries, now occupied in the mere assessment of the value of property in this class of cases, be more advantageously employed, but results more accurate and satisfactory could be obtained by the time and care which referees would bestow in investigating such claims. But the legislature have confined the power to a class only, and we cannot enlarge the statute to cover or include other cases.

Motion denied.

LEACH *against* WEEKS.

Supreme Court, First District ; Special Term, December, 1866.

ARBITRATION.—SETTING ASIDE AWARD.

In a special statute authorizing arbitrations and the entry of judgments upon the awards, a provision that such a judgment shall not be modified except for fraud, collusion, or corruption (*Laws of 1862*, 605, ch. 359, § 7), does not preclude the court from setting aside such a judgment, if the arbitrators, by reason of exceeding the submission, had no jurisdiction to make the award in question.

The submission of the question whether goods delivered corresponded to the sample by which they were sold, and must be accepted, does not authorize the arbitrators to award damages for a refusal to accept the goods.

Motion to set aside judgment and execution.

The plaintiffs in the judgment in this case were Augustus M. Leach and Horace E. Smith. The defendants were Foster J. Weeks and Freeman.

The New York Commercial Association was incorporated by an act of the Legislature, passed April 19th, 1862.

The fifth section of this act authorized the election of an arbitration committee of five members, whose duty it should be to hear and decide controversies which might be voluntarily submitted to them for arbitration. Section six of the act prescribes the form of the award by directing that it shall be signed by all the members of the committee, and provides for entering judgment upon the award ; and this section further provides that such judgment shall not be subject to be removed, reversed, modified, or in any manner appealed from by the parties thereto, except for frauds, collusion, or corruption of said arbitration committee, or some member thereof.

On October 15th, 1866, the plaintiffs and the defendants submitted to the arbitration committee the question whether three

Leach v. Weeks.

hundred barrels "Lawrence Co. Mills" delivered by Messrs. Leach & Smith to Weeks & Freeman as per contract of sale, was equal to sample by which the same was sold, and said Weeks & Freeman shall or shall not accept the same pursuant to such purchase. In a few days afterwards the defendants received from the plaintiffs a paper signed by the chairman and secretary of the arbitration committee, stating that the committee had decided that in their judgment, and in that of an expert to whom the samples were referred, there was little or no difference, and "that Weeks & Freeman must take and pay for the flour at the purchase price and the expense of storing," &c. Afterwards and on November 7th, 1866, the defendants received from the secretary of the arbitration committee an award dated October 31st, 1866, signed by all the members of the committee, deciding, on the judgment of the committee and of an expert to whom the samples were referred, that "there was little or no difference," &c.; that Weeks & Freeman had refused to take and pay for the flour; that there was a difference of one hundred and fifty dollars between the price which they agreed to pay for it, and its market value on the day when they should have taken it; that the cost of storing was thirty dollars, and that Weeks & Freeman should pay the alleged difference between the market value and the purchase price, and also the cost of storing.

Simultaneously with this award, Weeks & Freeman received from the secretary of the arbitration committee an extract from the proceedings of the committee on October 31st, by which extract it appeared that the committee had on October 31st, received on the part of the plaintiffs, evidence on which their award was based; and the affidavit made here on the part of the defendants alleged that the proceedings of October 31st were had in their absence and without notice to them.

Upon this second award, judgment was entered on November 5th, and execution issued, and levied; and Weeks & Freeman now move, on the judgment roll and on affidavit, to set aside the award, and the judgment, and execution.

INGRAHAM, J.—The charges of collusion are disproved by the affidavits of Sage & Boughton, and the judgment cannot be

interfered with on that ground. The difficulty in sustaining the judgment is that the committee exceeded their powers and decided matters not submitted to them. Although the statute designates frauds, collusion, or corruption of the arbitrators as the only reasons for setting aside the judgment, yet that does not refer to jurisdiction. If the committee had no jurisdiction, the award cannot be sustained. Suppose no submission had been made, and the committee had made an award on which judgment was entered, no one would pretend that it could not be vacated. So where the submission was of one matter and the arbitrators decided upon other matters, the award would be void.

In the present case the parties submitted to the committee the question whether three hundred barrels of flour delivered by the plaintiffs to the defendants were equal to the sample, and whether the defendants should accept the same under the contract. The first award communicated to the parties was in accordance with the submission, but from some informality it was treated as a nullity, and the committee made a new award, finding, first, that there was little or no difference, not enough to warrant a rejection of the flour; then, as the defendants had refused to pay for the flour, they awarded to the plaintiffs, damages for refusing to take it at the difference between the price agreed on and the market price on the day fixed in the contract for payment. This question was not submitted to the arbitrators, and they had no authority to pass upon it. If the parties did not comply with the award, it could have been enforced by a judgment or by an action for damages, but the committee exceeded their powers in assessing the damages for refusal.

The motion must be granted.

HARMAN *against* REMSEN.*Supreme Court, Second District ; Special Term, 1863.*

ATTACHMENT, AND LEVY ON MONEY.

To attach a debt due to the defendant in the attachment, the notice served on the debtor must specify the debt.

A notice in general terms referring to all debts and property of the defendant is not enough to give the attaching creditor priority over subsequent proceedings of other creditors.

This action was brought by Andrew Harman, against George Remsen, late Sheriff of Kings County, Charles Barth, John Williams, Philip R. Asbury, and Martin Cramer.

On the 29th day of October, 1860, Mr. Justice ALLEN of this court, on application duly made by John Williams and Philip R. Asbury, who are two of the defendants in the present action, issued a warrant of attachment in favor of Williams and Asbury against the property of Charles Barth, also a defendant in this action. The warrant was delivered to the sheriff of Kings County, also a defendant here, who, on the 30th day of October, 1860, as was claimed, served the attachment upon moneys due defendant Barth, in the hands of Andrew Harman, the present plaintiff. The amount in the hands of Harman was four hundred dollars.

Martin Cramer, one of the defendants in the above entitled action (who is a son-in-law of the defendant Barth), on the 18th day of December, 1860, recovered a judgment against Barth for one thousand four hundred and sixty-nine dollars and forty-nine cents, and on the 19th day of the same month, and the very next day after the recovery of judgment, he made an affidavit of the return of execution unsatisfied, and on the following day an order was made and served on the present plaintiff Harman to appear and be examined as to property belonging to Barth. He did appear and was examined, and nothing farther was done until March, 1862. In March, 1862, Cramer obtained an

Harman v. Remsen.

the order of special term of the supreme court directing Harman to pay over four hundred dollars, and interest from December 28th, 1860, to Cramer. No notice was given to the defendants Williams and Asbury, who had obtained the attachment which had been, as was claimed, levied on the fund.

On the 17th of April, 1862, Harman commenced this action to have an interpleader; and paid into the hands of the county treasurer of Kings County, the sum found in his hands. Defendants Williams and Asbury, and the defendant Cramer respectively claimed that such amount should be paid over to them.

Duncan McMartin, for the plaintiff.

N. F. Waring, for the defendant Remsen.

Elias J. Beach, for the defendants Williams and Asbury.

Philip F. Smith, attorney for the defendant Cramer.

SCRUGHAM, J.—It is not pretended that the mere issuing of the attachment in the suit of John Williams and Philip R. Asbury against Charles Barth, created any lien upon the debt which was due from the plaintiff to Barth; but, it is claimed, that the action of the sheriff under that attachment was sufficient to create such lien.

The Code, by section 235, provides the method in which the attachment which it authorizes shall be executed on property incapable of manual delivery. To attach a debt it is necessary that the debtor be served by the sheriff with a certified copy of the warrant of attachment, and also with a notice showing the property levied on. The defendant Harman was served with a copy of the attachment, upon which was endorsed a notice that by the attachment the sheriff was commanded to attach and safely keep all the estate real and personal of the defendant Barth within his county, except such articles as are by law exempt from execution, with all books of account, vouchers, and papers relating thereto, and that all such property and effects, and the debts, and credits of the said Barth then in said Harman's possession or under his control, or which might come into his possession, or under his control, would be liable to the plaintiff in that action, and requiring him to deliver all such property, &c., into the sheriff's custody without delay, with a certificate thereof. This was not such a notice as is con-

Harman v. Remsen.

templated by the 235d section of the Code as it does not specify the property levied on.

The attachment only authorizes a levy upon so much of the debtor's property as shall be necessary to satisfy the attaching creditor's claim with costs and expenses, and yet if this could be regarded as a sufficient notice, property of a much greater amount, and, in fact, all of the property of the debtor might be levied upon. It is evident that greater particularity is required in the notice, from the provisions of the 236d section, which enable the sheriff to compel the person owing the debt which he seeks to attach, to furnish a certificate of the amount and description of the debt; and, in fact, this notice endorsed upon the copy attachment served upon Harman should rather be regarded as a demand of such certificate than as a notice that the debt had been levied on. The obtaining of the certificate is a step preliminary to the levy, necessary when the amount and description of the debt are not known to the sheriff; and the levy is afterwards made by serving the person owing the debt with a copy of the attachment and a notice describing the debt levied on. No certificate was obtained by the sheriff, and it does not appear that any proceedings were taken to compel the delivery of any, or that any action was taken under the attachment. As therefore, there was no levy, the plaintiffs in the attachment suit acquired no lien upon the moneys due to Barth by Harman.

This point disposes of the case and it is not necessary for me to discuss the various objections which the defendants Williams and Asbury suggest to the order under which the defendant, Cramer claims the money in court, for as they acquired no lien by their attachment they are not in a position to question it.

Judgment should be entered that the moneys deposited by the plaintiff with the treasurer of the County of Kings be paid to the defendant Martin Cramer, and that the defendants John and Philip R. Asbury pay the costs of this action.

MIDGELEY *against* SLOCOMB.*Supreme Court, Second District; Special Term, Feb., 1867.*ASSIGNMENT FOR BENEFIT OF CREDITORS.—APPLICATION OF
PAYMENTS.—SALE OF COLLATERALS.

Although a creditor holding collateral security is entitled, after the debtor makes a general assignment for the benefit of creditors, to enforce the collaterals, and also claim a dividend under the assignment until his debt be fully paid, yet in computing the amount of the dividend the claim of such creditor must be taken as reduced by the amount which he has received under the collaterals.*

In such cases the court cannot order a sale of the collaterals which are uncollected, but only the interest of the debtor in them.

Motion to confirm a referee's report.

This action was brought by the plaintiff, Sarah W. Midgeley, as a creditor of the firm of Wilson Midgeley & Jennings, to compel the defendants, Thomas Slocomb and another, to account, as assignees of the firm.

The action was referred to Judge Greenwood to take the account, adjust the claims of the respective creditors, and report.

Upon the hearing before him, it appeared that the Park National Bank held an indebtedness against the assignors, at the time of the assignment of \$23,500, for money borrowed, which had been reduced by collections from notes held as collateral at the time of the assignment, at \$9,573.25. The bank claimed the right to exhaust the collaterals, and that the dividend under the assignment must be on the amount due at the date thereof, \$23,500, and not on the balance due them at the time of the dividend, \$9,573.25—they having the right to two funds.

The referee decided against this claim of the bank, and ordered a dividend on the amount due at the time of distribution, and also ordered a sale of the collaterals.

* The United States Bankrupt Act of March 2, 1867, requires the creditor to surrender or purchase the securities. §

A motion was made to confirm the referee's report.

Barlow & Hyatt for the National Park Bank, opposed, cited *Miller's Case on Appeal*, 11 *Cusey*, (35 *Penn.*), and other similar cases from the English reports.

Messrs. Winslows for the plaintiff.

Platt, Gerard & Buckley for defendants.

T. Cronin for Smythe, Sprague & Cooper, in support of referee's report.—I. The doctrine of application of payments has full force between the assignors and the Park Bank.

The assignors were borrowers of the bank, and secured them by depositing collaterals. As they were collected, they must apply in reduction of the assignors' debt. This principle has application to the relation of the assignors to the bank in every aspect and in all its legal bearings (see *Stone v. Seymour*, 15 *Wend.*, 19; *Seymour v. Van Wyck*, 8 *Id.*, 403; 19 *Id.*, 19).

II. The court will direct the payments received from the collaterals to be applied for the benefit of all the creditors interested in the assigned fund, as well as for the benefit of the debtors (*Baker v. Stackpole*, 9 *Cowen*, 420).

III. In this case the creditor has actually made his election, and applied the payments received from the collaterals to the reduction of the original debt. Having made an election they are bound by it, and cannot now say that the assignors owe them the original debt (*Allen v. Culver*, 3 *Denio*, 284).

IV. In this case the assignors made an application by the terms of the trust contained in the assignment, and provided that the Park Bank should be paid pro rata upon the notes of which they were holders, i. e. notes unpaid, and existing liabilities, against the assignor at the time of a dividend from the assigned assets. The recital in the assignment is—"appropriating their real and personal property of every kind and description towards the payment of their debts and obligations in the order of preference and priority hereinafter declared, and for the purpose of securing to their creditors a just division of the property of said parties of the first part." Thus providing against any inequitable rule of marshalling assets, or applying money derived from collaterals, or receiving dividends, without deducting payments derived from collaterals.

Midgeley v. Slocomb.

V. The trust in the assignment further provides for the payment of the debts mentioned in Schedule B, including the debts due the Park Bank as a secured provision, "towards the payment of the persons or corporation HOLDERS now, or at any future time, for the time being, of all NOTES or other obligations of the parties of the first part." Thus limiting the assigned fund to a pro rata distribution from it, to the holders of notes unpaid at the time of the distribution of the assigned assets. The Park Bank cannot be the holder of notes paid, in part, by the assignors, from collaterals. These notes have been paid, and are not now held in the legal sense of the term, and could not be recovered against the assignors. They have been paid in part, and the dividend can only be on the balance due at the time of declaring it by the referee. The Park Bank could not now recover of the assignors the amount of those notes already paid from moneys realized from the collaterals. They are not held by them in law, they are only physically in possession of the bank. Hence they can only receive a dividend upon the amount now due, after deducting payments received through collaterals. As to who is deemed a lawful holder of notes, see Story on Promissory Notes, § 115, p. 122. When a note is received as collateral security for a pre-existing debt, and subsequently paid, the person receiving payment ceases to be a bona fide holder of the note (*Id.* and cases cited, § 195, p. 222).

VI. If the court can, by the application of reasonable and fair rules of construction to the terms of the trust in the assignment, prevent the Park Bank from receiving an unequal share of the funds in the hands of the assignees, they will be bound to do so, and require them to abide by the directions of the assignors to pay *pro rata*, and declare the payments from collaterals to be *pro tanto* a reduction of their debt. (*Id.*, § 411, and cases cited).

GILBERT, J.—I take it to be clear law, as well as equity, that when a debtor makes a general assignment of his property upon trust to pay his debts, and therein prefers a creditor to whom he had before the assignment given security for the payment of the debt due him, such creditor is entitled to the benefit of the collateral security, as well as his interest as a *cestui*

Midgeley v. Sloccomb.

que trust, until such debt shall have been fully paid. If the collateral security be sufficient to pay the debt, equity, in order to protect creditors who have no lien on it, will compel the creditor holding the collateral security to resort to that in the first instance; and even if it be insufficient, the same proceeding may be decreed when it will not trench upon the rights or operate to the prejudice of the creditor entitled to the double fund (*Story Eq. Jur.*, § 633; *Adams' Eq.*, 272; *Strong v. Skinner*, 4 *Barb.*, 559; *Besley v. Lawrence*, 11 *Paige*, 581).

But as was said by Lord Cottenham in *Mason v. Bogg* 2 *My. & Cr.*, 443), a creditor who thus has a double security has a right to proceed against both, and to make the most he can of both. If a dividend under the assignment so reduces the debt that the collateral security will more than pay it, the only remedy of the assignors, or of the other beneficiaries, is to redeem (*Story Eq. Jur.*, § 564, 6; *Lewin on Trust*, 485; *Brinkerhoff v. Marvin*, 5 *Johns. Ch.*, 320; *Hays v. Ward*, 4 *Id.*, 132; *Woolcock v. Hart*, 1 *Paige*, 185; *Aldridge v. Cooper*, 8 *Ves.*, 382, and *Notes in Lead. Cas. in Eq.*, 3d Am. ed., 276, *et seq.*).

The Park Bank therefore has a right to receive its share of the proceeds of the assigned property, and to retain and enforce the collateral securities which it holds until the debt due it shall have been paid.

The question then is, what is its share of the funds now in the hands of the assignees.

This depends on the interpretation of the instrument itself, and cannot be determined upon any notion of equity or equality, for the court has no power to create or order a new trust. The trust is "to apply the proceeds towards the payment of the persons or corporations, *holders now* or at any future time, for the time being," of a specified class of notes of the assignors. At the date of the assignment the bank held notes belonging to this class, amounting to \$23,500, which were secured by a pledge of notes of other parties. The bank has since collected \$16,330.98 on account of these collaterals, leaving due \$9573.55. The law applied these collections to the payment of the principal debt, so that the bank has ceased to be the holder of the notes thus paid. I think that the meaning of the

Limburger v. Rauch.

assignment is that the assignees shall pay debts outstanding at the time of the execution of the trust, and not, as was contended by the counsel for the bank, that they shall make a distribution on the basis of the original indebtedness.

The referee's report on this point is confirmed.

But the referee erred in relation to the proposed sale of the collaterals still held by the bank. There may be a decree for the sale of the interest of the assignors in them. But the court cannot interfere with the right of the bank to collect them.

A decree will be prepared and settled.

LIMBURGER *against* RAUCH.

Supreme Court, Second District ; General Term, February, 1867.

PROBATE OF WILL.—GUARDIAN AND WARD.—BURDEN OF PROOF.

There is not necessarily a legal objection to a will made by a ward in favor of a guardian.

If the guardian procures the execution of the will in his favor, the law presumes undue influence, and casts the burden of proof upon him to show the act to have been that of a voluntary, capable, and understanding testator.

Appeal from a decree of the surrogate of the county of Westchester, admitting a will to probate.

The will of Augustus Adolphus Limburger, deceased, having been admitted to probate, Frederick Limburger, the uncle of the deceased, appealed from the decree. John H. Rauch, one of the respondents, was the guardian of the deceased, and Catherina Rauch, the other respondent, was the wife of such guardian. The will of the testator gave all his personal estate to Mr. and Mrs. Rauch, and appointed the former his executor.

Limburger v. Rauch.

James Eschwege, for the appellants. The following facts are established by the evidence in the case.

First. Upon the evidence it is clearly established that the testator was, at the time the pretended will was made, wholly in the power of Rauch, dependent on him for the smallest sums, for every comfort, and entirely under his control; that Rauch had possession of all his property, and never had given any account or information as to its amount.

Second. That at the time the pretended will was made Rauch was sole acting executor of the will of the father of deceased, and sole acting testamentary guardian of the latter.

Third. That Rauch has concealed from Mr. Frederick Limburger the fact that he, Frederick, was appointed executor and guardian by the will of his deceased brother, the father of Gustavus, and also the fact that Gustavus has made a will, and this, as Rauch says, by advice of counsel.

Fourth. That the will was drawn by and signed in the presence and under supervision of Mr. Rauch's counsel, retained by him for that purpose, and without the knowledge of either of the uncles of Gustavus; the presence of Rowley, who was retained by Rauch, is evidence of restraint, which is not overcome by the studied absence of Rauch from the sick room, who immediately after the execution of the will appears, takes possession of the will, puts it in his pocket and carries it away, thus depriving deceased of the power of revocation by destruction.

Fifth. That until the 22d of July, 1864, Gustavus had the kindest feelings of affection for his uncles and their families, and that, if on the 5th of August, 1865, these feelings were changed into hatred and hostility, without apparent reason, such change must have been the result of undue influence and misrepresentation on the part of the persons under whose control the dying boy then was.

Sixth. That at the time of making the will, deceased, then weak in body and ailing, labored under the delusion that his uncles had badly treated him, that they were the cause of his enlisting in the army, and that one of them had said that it would have been better if he had been killed in battle, and that these delusions were entirely unfounded.

Limburger v. Rauch.

Seventh. That until April, 1864, he hated and disliked Mr. Rauch, complained of his want of attention, &c.; that feeling of hatred and dislike was suddenly changed into extreme fondness and love; the change was so effective that the boy of 18, after 12 years' oblivion, again remembered the great kindness exhibited by Mr. and Mrs. Rauch to his deceased parents, at a period when he was only six years of age.

The onus is on Rauch to support the transaction by showing the fullest volition, knowledge and deliberation in Gustavus Limburger, who was then very sick and weak, easily led and influenced, Rauch being his guardian, in full possession of his ward's property, with the ward wholly under his influence and control, and also to show *affirmatively* the utmost good faith (*uberrima fides*) and all absence of influence on his part.

Upon the question of law, *Mr. Eschwege* argued the following.—I. The will is void, being a gift, a gratuity, by an infant in favor of his guardian, made when his person and property were under the exclusive control of his guardian and the trust remained unsettled. Such transactions are set aside from public policy (*Story on Equity, Jurisprudence*, vol. 1, §§ 317, 318, 319; *Reeve on Domest. Relations*, p. 472; *Tiffany & Bullard on Trustees*, p. 134; *Archer v. Hudson*, 7 *Beavan*, 551; *Hatch v. Hatch*, 9 *Vesey, Jr.*, 292; *Pierce v. Waring*, cited 1 *Vesey, Jr.*, 379, 2 *Vesey, Jr.*, 548; *Montesquieu v. Sandys*, 18 *Vesey, Jr.*, 313; *Wood v. Downes*, 18 *Vesey, Jr.*, 127; *Hylton v. Hylton*, 2 *Vesey, Senr.*, 548; *Osmond v. Fitzroy*, 3 *Peere William's Rep.*, 129; *Kirby v. Taylor*, 6 *Johns.*, 248; *Bergen v. Udall*, 31 *Barb.*, 9; *Gale v. Wells*, 12 *Barb.*, 84; *Whelock v. Stuart*, 28 *How.*, 89).

And this rule and policy apply to *wills* as well as to *deeds*; the influence which directs the execution of a *deed* can with equal facility cause the making of a *will* (*Morris and Wife v. Stokes*, 21 *Geo. Rep.*, 552).

In this case LUMPKIN, J. in delivering the opinion of the court, says: "These adjudications are put upon the ground of public policy. Is there any difference in this respect between deeds and wills? In *Waring's* case Lord Hardwicke said, 'Waring had been concerned as guardian, and as soon as the infant came of age, made up the account and retained that gratuity to himself, the same influence of the guardian continu

Limburger v. Rauch.

ing, being done when his effects were to be delivered over; was not this influence existing much more potentially while the ward of Lewis was still a minor, and the relation of guardian still subsisted? Will a deed made by a ward, even after he has come of age, be set aside, and a will made during the infancy not be questioned? Counsel have submitted no authority to justify any such distinction. I have met with none."

II. The fiduciary relation of the proponent to deceased, his agency in drawing the will and procuring its execution, and the beneficial interest of himself and his wife under it, create a presumption of fraud and undue influence, which is not overcome by any satisfactory evidence that there was no undue influence exercised (*Lake v. Ranney*, 33 *Barb.*, 49; *Newhouse v. Godwin*, 17 *Barb.*, 237; *Vreeland v. McClelland*, 1 *Bradf.*, 393, 424, 425, 428; *Ingram v. Wyatt*, 1 *Hagg.*, 385; *Whelan v. Whelan*, 3 *Conven.*, 556, 576, 585 and 586; *Mason v. Ring*, *Court of Appeals*, *manuscript*; *Morris v. Stokes*, 21 *Geo. Rep.*, 552; *Kirby v. Taylor*, 6 *Johns.*, 248; *Sears v. Shafer*, 6 *N. Y.* [2 *Seld.*], 268; *Hunter v. Atkins*, 3 *Mylne & Keen Rep.*, 135; 10 *Eng. Ch. Rep.*; *Whitehorn v. Hives*, 1 *Mnnford*, 557; *Taylor v. Taylor*, 8 *How. U. S. Rep.*, 183).

III. The circumstances of the case, the sudden change in the feelings and disposition of the deceased, without any apparent or substantial reason, the cordial relations between him and his uncles and cousins existing immediately before the execution of the will, his dislike and distrust of his guardian, which appeared to have been mutual, the treatment he received at the hands of his guardian until April, 1864, and the guardian's extreme and extravagant attention and kindness to testator *after* that date; the suppression by proponent of all information to the uncles in respect to the will, his taking and retaining possession of the will, thus rendering revocation by destruction impossible, the delay in offering it for probate—all these circumstances unexplained, show undue influence on the part of the guardian; if not, they certainly must leave the conscience of the court in *equilibrio* on the question whether this will was the free, deliberate and *uninfluenced* act of the deceased; on either ground probate should have been refused (*March v. Tyrrel*, 2 *Hagg.*, 84; *Blewitt v. Blewitt*, 4 *Hagg.*, 210; *Jones v. Goodrich*, 5 *Moore, P. C.*, p. 19; *Middleton v.*

Limburger v. Rauch

Forbes, cited in 1 *Hagg.*, 395 ; Mowry v. Silber, 2 *Bradf.*, 133, 149 and 151 ; Vreeland v. McClelland, 1 *Bradf.*, p. 428 ; Parish Will Case, 25 *N. Y. Rep.*, 7 ; Opinion of GOULD, J., at page 92, 94 and 95 ; Morris v. Stokes, 21 *Geo. Rep.*, 552, and cases cited sub. II).

IV. The maxim *se scripsit haeredem* applies, the will being drawn by and executed under the supervision of proponent's counsel. *Qui facit per alium facit per se* (Parish Will Case, 25 *N. Y. Rep.*, 35, 92, and cases there cited ; Paske v. Ollat, 2 *Phillimore*, 323).

V. The testator, at the time of making his will, was laboring under delusions, against all evidence and probability, in respect to his uncles, who would naturally have been the objects of his testamentary bounty ; the dispositive provisions of the will were, or might have been caused or affected by such delusion ; if so, the instrument propounded can not be deemed to be his will (Seaman's Friend Society v. Hopper, 33 *N. Y. Rep.*, p. 619 ; Same Case, 43 *Barb.*, 625 ; Boyd v. Ely, 8 *Watts*, p. 71 ; Woodbury v. Obear, 7 *Gray*, 467 ; Dew v. Clark, 3 *Add. Ecc. Rep.*, p. 79 ; Same case on appeal, 5 *Russell Chan. Cases*, p. 163 ; Stanton v. Wetherax, 16 *Barb.*, 259 ; Johnson v. Moore's Heirs, 1 *Little Rep.*, 371 ; Leech v. Leech, 11 *Penn. L. J.*, 179 ; *Ray Med. Jurisprudence on Insanity*, §§ 232 to 237 ; *Wharton & Stille on Med. Jurisprudence*, § 14.

J. W. Tompkins, for the respondents ;—insisted that it is only a rule of evidence, that beyond the proof of the factum, the burden remains on the proponent to show by additional testimony *spontaneousness and volition* (Wilson v. Moran, 3 *Bradf.*, 180, 181), and that in this case it was fully proved that the will of the testator was made solely of his only volition, uninfluenced by any one, and just as he intended and desired it should be made.

BARNARD, J.—The testator on August 5th, 1864, made the will in question ; he was then a little over nineteen years of age. The will was made and executed at the house of John H. Rauch, in Hastings, Westchester county, with whom the testator then lived, and had so lived from the preceding March, and continued so to do until after it was made, until the 30th of October, 1864, when he died there. At the time

Limburger v. Rauch.

of the execution of this will, John H. Rauch was the testamentary guardian of intestate under his father's will, and had in his hands all his property, amounting to between two and three thousand dollars. By the will, the testator bequeathed all his property to John H. Rauch and Anna his wife. The next of kin of deceased, were two paternal uncles and a paternal aunt. There is no legal objection to a will made by a ward in favor of a guardian. In such cases, when the guardian has been at all instrumental in procuring the execution of the will, the law presumes undue influence by reason of the confidential relation existing between guardian and ward, and the guardian who proposes such acts must go beyond the mere formal execution of the paper, and show the act to have been the act of a voluntary, capable, and understanding testator. All that can be truly said is, that if a person, whether an attorney or not, prepare a will with a legacy to himself, it is at most a suspicious circumstance of more or less weight, in some of no weight at all (1 *Curteis*, 637; *Bullen v. Barry*, and approved in *Coffin v. Coffin*, 23 *N. Y. Rep.*, 9).

The facts disclosed by the evidence are briefly these. The testator lost his father and mother at the early age of six years he was received into the family of his father's brother, Frederick Limburger, he continued there about three years and was then placed at school in Germany by his uncle, Frederick Limburger. On his return from Germany he lived about eight months with his uncle, and then, after several unsuccessful efforts to engage in business, he enlisted in 1862, in the 121st Regiment N. Y. Volunteers; his health failed in the army, and in April, 1863, he was discharged; he returned to his uncle Frederick's house, and stayed a short time there, engaged in business, and then went to live with his uncle Charles, paying him his board until April, 1864, when Mrs. Rauch went and took him from there to her husband's house in Hastings. Rauch had been very intimate with testator's father, had been his assignee, and was his executor, and the guardian of his son. Testator's father had died at Rauch's house, and Mrs. Rauch had left her home to nurse his mother, and had also attended the last moments of testator's brother and sister when they died. Mrs. Rauch tenderly and kindly

Limburger v. Rauch.

nursed and cared for testator from April, 1864, until his death, with the exception of about two weeks, when the deceased was in Orange, New Jersey. During all this time his health was very bad and continually failing ; his disease was consumption. The will was drawn by Robert Rowley, an attorney of this court ; he was not the attorney of Rauch, except that he had drawn a confession of judgment six years before for him. Rauch carried a message from testator to Rowley that he would like to see him. Rowley went, and testator told him he had sent for him to draw his will ; he told him his age, in what his property consisted, that he was not married, and had no near relations, and that he wanted to give all his property to Mr. and Mrs. Rauch. That they had been so kind to him, that his relations had not. That this will in favor of Rauch was his own voluntary act, and own voluntary conclusion. That he would not leave his relations a cent, but would leave all to Mr. and Mrs. Rauch "because they had both been so kind to him." The will was drawn, read over by Rowley carefully and audibly ; he said it was all just right ; when asked if he wished it read again, he replied, "I understand it perfectly, it is just as I want it." The will was then executed, neither Mr. or Mrs. Rauch being present at the instruction for, or execution of the will. The will after it was executed, was sealed up by Rowley, and delivered to testator, who in the presence of Rowley handed it to Rauch, and asked him to take care of it.

The proof of the capacity of the testator is abundant, and is not questioned by any witness. I think the facts dispel any presumption of undue influence over the testator, and show spontaneity and untrammelled will in testator ; he had a home, care, affectionate attention, and sympathy from his father's and mother's friends, and his guardian, and he freely, and understandingly executed the will in their favor.

The amount bequeathed is reasonable, and the will should stand.

Judgment affirmed with costs.

affirmed
2 July, 395.

NATIONAL BANK *against* SACKETT.

New York Common Pleas; Special Term, March, 1867.

ASSIGNMENT.—POWER OF PARTNERS.

The rule that since the statute requires assignments for benefit of creditors to be acknowledged, an assignment cannot be executed by an attorney in fact, does not preclude the partners who remain, after one of their number has absconded, from executing an assignment of the assets of the firm.

Motion for an injunction.

The plaintiffs, who were creditors of defendants' firm, sued for the appointment of a receiver, and to enjoin the defendants from making an assignment of their assets. The facts are stated in the opinion.

CARDOZO, J.—I understand the following propositions to be fairly deducible from the authorities:

First. That an assignment of all the property of an insolvent partnership may be valid, although not executed by all the partners, if authority in the partners executing it has either been expressly granted, or may be inferred from circumstances (*Trelles v. March*, 30 *N. Y.*, 330; *Kelly v. Baker*, 2 *Hilt.*, 531; *Roberts v. Chollar*, *Gen. T., Com. Pleas*, April, 1866).

Second. That such an assignment cannot be sustained where the non-executing partner is present (See cases collected in *Palmer v. Myers*, 43 *Barb.*, 509, and also *Welter v. Schleifer*, 4 *E. D. Smith*, 707).

Third. That mere absence, unaccompanied by any other circumstance, will not imply a power on the partners present to execute such an assignment (*Robinson v. Gregory, Court of Appeals*, Dec., 1864, cited in *Welles v. March, supra*).

Fourth. That fraudulently absconding from the country, leaving a letter authorizing the remaining partners to close up the business, and stating that the interests of the absconder was thereby assigned to them, gives power to them to make a general assignment of the partnership effects (*Welles v. March, supra*; *Kelly v. Baker, supra*), and also, that such a fraudulent absconding alone, without leaving any communication, has the like effect, and amounts to an abandonment of the management and disposition of the joint property (*Palmer v. Myers, supra*).

I should, therefore, have no difficulty in deciding the question now presented except for the decisions of this court in *Adams, Receiver v. Houghton (General T.)*, from which I dissented, in which it was held that as the statute of 1860, respecting assignments, required that they should be acknowledged by the assignor (*Cook v. Kelly*, 14 *Abb.*, 466), an assignment could not be executed by an attorney, in fact, in the name, and on behalf of his principal. But, after careful consideration I have concluded that, giving full effect to that decision, as of course, I should and would do, it does not apply to the present case. It should, I think, be applied and only extends to such assignments as cannot be upheld unless executed by all the partners—as in the case of all of them being here, or of mere absence of one of them.

In other words it relates to the form and manner in which the assignment must be executed by those who are necessary parties to it, but does not affect the question of who those necessary parties are.

But the question here is, who are necessary parties to the instrument, and in this and similar cases I think the assignment does not need to be executed by or in the name of the absconder, and is good and effectual, though executed by the parties remaining in charge of the business. If the absconding of a partner only had the effect to give, by implication, a power to his co-partners to act in his name, I should be of

National Bank v. Sackett.

opinion that as the general term had held that an express power was not sufficient to uphold an insolvent assignment, an implied one certainly could not be, and it would present a case where, owing to the misconduct of one of the partners, the firm would be deprived of an advantage which it ordinarily would possess. But the effect of absconding, as will be found by a careful examination of the case mentioned, is, and I think should be, extended. It is to vest in those who remain the right to control and dispose of the property in their names the same as if the absconding partner had no further interest in it. Their act, though not done in his name, binds him; and an assignment executed by them effectually passes the title of the property of the partnership, although his name is not affixed to it as if signed by an attorney in fact or otherwise. The abandonment authorizes the remaining partners to execute the assignment, and thus executed, it conveys, if the language covers it, the whole partnership property.

If these views be correct, the assignment as executed in this case passed the whole partnership property, and having been duly personally acknowledged by all the parties whose concurrence was necessary, under the circumstances, to transfer the title, it is not amenable to any objection of the character covered by the decision in *Adams, Receiver v. Houghton*. The other point relied upon does not seem to me to require any especial remark. The injunction should be dissolved. The costs may abide the event of the action.

PEOPLE *against* MATTIER.

Supreme Court, Sixth District; Special Term, December, 1866.

INJUNCTION.—ACTION TO TRY TITLE TO OFFICE.

In actions to oust persons exercising the duties of public officers under a claim of right, a temporary injunction restraining them from exercising the duties of the office, pending the litigation, should not be granted.

The same reasons which forbid the issuing of an injunction in such a case, apply in the case of a litigation as to officers of corporations,—such as the trustees of a State asylum.

Motion to dissolve an injunction.

This action was brought in the name of the People of the State of New York against Richard Mattier and others.

The five defendants were, with others, elected in June, 1866, trustees of the New York State Inebriate Asylum. At a regular monthly meeting of the trustees, held in July, 1866, resolutions were adopted declaring that the five persons above named as defendants were not subscribers or stockholders of said corporation to the amount of ten dollars each, and, therefore were not eligible under the act of incorporation (*Laws of* 1857, 429; *Laws of* 1861, 120) to the office of trustees, that their offices were declared vacant, that a special meeting of the said trustees be called on the 2d Tuesday of September, then next, to fill said vacancies. Such special meeting was thereupon duly held in pursuance of said resolution, and in accordance with the provisions of the by-laws of said corporation. The day upon which such special meeting was held was also the day upon which the regular monthly meeting of said trustees was held.

At this meeting each of said defendants in succession tendered his resignation, the same was accepted, and each of said defendants were immediately re-elected to the office so resigned, each of said defendants having before said special meeting become a subscriber and stockholder of said corporation, so as to

The People *v.* Mattier.

make him eligible to the office of trustee. Each of said defendants were present at such meeting and voted upon all questions except upon his own re-election. Besides these five defendants, there was present a full quorum of the trustees of said corporation, and upon the re-election of each of said defendants as trustees a majority of such quorum, after excluding said defendants, voted for the re-election of each of said defendants. About the first of October, this action in the nature of a quo warranto was commenced against these defendants, who were then in the exercise of the duties of the office of trustees of said corporation. The relief demanded is an injunction against the defendants, restraining them from exercising the duties of such office, and that they be ousted therefrom. A temporary injunction was granted, and has been served upon the defendants, and a motion is now made to dissolve.

L. Seymour, for the defendants.

F. Kernan, for the plaintiffs.

BOARDMAN, J.—I think there can be no doubt that in actions to oust persons exercising the duties of public offices under a claim of right, a temporary injunction restraining them from exercising the duties of the office pending the litigation will not be granted (*The People ex rel. Wood v. Draper*, 4 *Abb. Pr.*, 333; *Tappan v. Gray*, 9 *Paige*, 507; affirmed, 7 *Hill*, 259; *Howe v. Denell*, 43 *Barb.*, 504). I have looked in vain for a single case recognizing such a right. The reasons for refusing an injunction in such cases are clear and powerful. The exercise of the duties of offices are necessities to the public welfare. Unless the officer *de facto* is permitted to discharge the duties, they can not be discharged until the end of the litigation, and the legal title is determined. This in many instances might involve a long time, and the public might suffer serious injury, loss, and inconvenience. In frequent cases it might block the wheels of state, while the petty inquiry was being investigated, whether one or the other of two persons was the legal incumbent, entitled to exercise the duties of the office, and receive the pay therefor. The controversy is essentially personal, in which view the public have no care. The people by their laws require that certain duties essential to the well-being of the

The People v. Mattier.

State or community shall be exercised by individuals as officers or agents. The body politic is too unwieldy to act, and the power is delegated under rules, restrictions, and penalties that the essential duties may be performed under responsible, official sanction. Under these circumstances it has been deemed better that an officer *de facto* should discharge the duties of an office, rather than they should not be discharged at all (Thompson v. Commissioners of Canal Fund, 2 *Abb. Pr.*, 248; Tappan v. Gray, *supra*; The Mayor, &c. v. Flagg, 6 *Abb. Pr.*, 296, 301; Hartt v. Harvey, 32 *Barb.*, 55; The Mayor, &c., v. Conover, 5 *Abb. Pr.*, 171, 179, 180; Lewis v. Oliver, 4 *Id.*, 121, 126).

If the defendants are public officers within the meaning of the foregoing cases, the injunction should be dissolved beyond any doubt. Even though they be not public officers, the same reasons apply in a lesser degree, why they should not be restrained from discharging the duties of an office which they, in fact, hold, and no one else is authorized to hold in their place or stead. I think the rule applicable to public officers, and to officers of corporations, is the same, and in neither case will courts exercise their equitable power by injunction in a legal action practically to oust an incumbent from his office, during the pendency of the litigation brought to determine that very question.

For this reason I am disposed to grant the motion to dissolve this injunction. I take this position with reluctance, since it has not been presented or anticipated in the briefs of counsel with which I have been furnished.

It will not be improper to say, moreover, without giving my reasons, that I have come to the same conclusions upon the merits, that the injunction should be dissolved.

Motion to dissolve injunction granted, with ten dollars costs to defendants.

WILLIAMS *against* MURRAY.*Supreme Court, Sixth District ; General Term, July, 1866.*

MOTIONS AND ORDERS.—COSTS.

The costs allowable on an order made in the county court upon denying a motion to dismiss an appeal from a justice's court,—stated.

An order, made by the court, must be entered accordingly, and it is irregular to disregard it because erroneous, and to enter a different order.

The costs upon an appeal from an order of the county court are not the costs of motion fixed by section 315 of the Code of Procedure, but are costs of an appeal from an order fixed by section 307.

Where, upon an appeal from an order fixing the costs, the order appears to be irregular, the court may do justice to the parties, by a new order, without requiring the matter to be again brought up.

Appeal from an order.

The facts are stated in the opinion of the court.

BY THE COURT.—PARKER, P. J.—This action was originally commenced in a justice's court, in which the plaintiff obtained judgment against the defendant. The defendant brought an appeal to the Otsego county court. The plaintiff thereupon moved, in the county court, for a dismissal of the appeal, on the ground of certain alleged irregularities, which motion was denied.

From the order denying the motion, an appeal was taken to this court, where the order of the county court was affirmed with ten dollars costs, as specified in the order of affirmance. The defendant's attorneys, disregarding the fixing of the costs by the court at ten dollars, made up a bill of costs under subdivision 5, of section 307 of the Code, amounting to sixty dollars and fifty-nine cents, and procured the same to be taxed by the clerk of Otsego county, and an order to be entered by the clerk that the defendant recover the same.

A motion is now made to set aside that order as unauthorized and irregular. The order complained of was entered at large in the clerk's office of Otsego county, from the brief

Williams v. Murray.

order made at general term, in which the court fixed the costs of the appeal at ten dollars. Whether this fixing of the costs was erroneous or not, it was the order made by the court, and it was clearly irregular for the defendant's attorneys to disregard it and enter an order different in respect to costs from the one made by the court. An improvident order is to be regarded, until set aside; and if this one was such, the proper course of the defendant's attorneys was to move the court to correct it (2 *Cow.*, 436; 4 *Hill*, 554; 10 *How.*, 415).

It cannot be said that the order was a nullity, even if the defendant was, under the Code, entitled to the costs claimed, more especially as the proceeding in which they were incurred was an interlocutory proceeding in the action, and by section 311 of the Code, it belonged to the court, and not to the clerk, to adjust the costs.

At most, then, the fixing of them at ten dollars was erroneous: it was binding, therefore, upon the parties, until corrected by an order of the court. On the decision of the question raised by the appeal, the question of costs of the appeal was not considered, but the case was regarded, as well by the counsel, in the manner of its presentation, as by the court, as a special motion, and motion costs only were therefore allowed. It may be well, therefore, now to examine this question, for if the defendant is right upon the question of amount, and wrong only in his mode of proceeding to reach it, that fact may induce us to modify the order which we should otherwise make. The appeal was from an order of the county court, and brought by virtue of section 344 of the Code. Subdivision 5 of section 307,—which provides for costs on appeal in this court, as follows; “To either party on appeal, except to the court of appeals, and except appeals in cases mentioned in section 349, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either party before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial on a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265.” This is an appeal to the supreme court from an

Williams v. Murray.

inferior court under chapter 3, of title 11 of the Code (§ 344), and it is clear that it is not within any other exception contained in the subdivision of section 307, above set forth, but stands, so far as this section is concerned, on the footing of an appeal from a judgment of an inferior court.

There is no other section of the Code which applies to this question, unless it be section 315, which is as follows: "Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action."

It is insisted, by the plaintiff's counsel, that the application to the court upon the appeal was a motion, and, therefore, the defendant was entitled to motion costs only, as allowed by the court. If it is a motion, it is like the other cases provided for in said subdivision 5, an enumerated motion (*Rule 40*). It is also an appeal, and the costs of an appeal, in such a case, are specifically provided for by section 307, as already seen. Hence the motions contemplated by section 315 do not include such as this, which are provided for by section 307. In *White v. Anthony* (23 *N. Y.*, 164), it was held that an appeal from an order carried the same costs in the court of appeals as an appeal from a judgment, the costs depending upon subdivision 6, of section 307, which makes no exception of appeals from orders from its provision. An appeal from an order in the court of appeals, is no less a motion than such an appeal in this court, and if section 315 does not control the costs upon such an appeal there, it cannot here. As, therefore, the exception in subdivision 5, of section 307, does not include this case, the defendant was entitled to the costs specified in that subdivision, being the amount at which the clerk taxed them.

Inasmuch as we see that, on the merits, the defendant is entitled to the costs which he has taxed, which would have been granted him upon an application to correct the order made by the court, we may, as the case is now before us, do justice to the parties in the premises, without requiring the matter to be again brought up for that purpose. The defendant must suffer the penalty of his irregularity, and his order must be set aside with ten dollars costs, unless within twenty days he pays the

Carter v. Loomis.

plaintiff ten dollars costs of this motion. If such payment is made, the order of the general term is to be corrected, and the order complained of is to stand as the order of the court.

Ordered accordingly.

CARTER *against* LOOMIS.

Supreme Court, First District ; At Chambers, March, 1867.

ARREST.—DISCHARGE FROM IMPRISONMENT.

If a defendant arrested in a civil action is prejudiced by the delay of the plaintiffs to enter judgment, and charge him in execution, he should move to compel them to do so, and cannot charge the plaintiffs with *laches* unless he has so moved.

Where, however, the plaintiffs have been guilty of gross negligence in this respect, they may be required to stipulate to waive any objections to his taking the benefit of the fourteen day act, and the defendant be allowed to be discharged under that act on giving the usual notice.

Motion for discharge from imprisonment.

This action was brought by Oliver S. Carter and Henry E. Hawley against Theodore H. Loomis, to recover the amount of moneys alleged to have been embezzled by the defendant from the plaintiffs.

The plaintiffs procured an order of arrest against the defendant upon which he was imprisoned. The plaintiffs, after the arrest, and after default on the part of the defendant, delayed for some time to enter up judgment.

The defendant now moved to be discharged from imprisonment, on the ground that the process for his arrest had been abused by the delay to enter judgment, leaving him in prison, meanwhile, or if such relief should be denied, that the day of the entry of judgment should be fixed, *nunc pro tunc*, at the earliest day at which the judgment might have been entered, so that the whole time during which he might have been charged in execution upon the judgment, should be counted in

Goodyear v. Brooks.

the three months required by law for the prisoner to be charged in execution before taking benefit of the fourteen day act, allowing a discharge from imprisonment in certain cases.

John L. Graham, for the motion.

Joseph H. Choate, opposed.

INGRAHAM, J.—The defendant might at any time have compelled the plaintiffs to charge him in execution after judgment. Not having done so, he cannot charge the plaintiffs with *laches* for his delay.

He is entitled, however, to an order requiring them to charge him in execution within sixty-five days after notice of the order. This proceeding is regulated by statute, and the defendant is required to act before he is entitled to relief, unless the plaintiffs also are in fault.

Here the plaintiffs have been guilty of gross negligence, for which they are not entitled to any favor. After defendant is charged in execution he may take the fourteen day act and be discharged. I think the defendant should be allowed to do this at once. If the plaintiffs stipulate to waive any objections to the debtor taking the fourteen day act for want of being charged in execution, and the debtor gives fourteen days' notice and makes an assignment, as provided under that proceeding, he may be discharged. If plaintiff does not so stipulate, in five days the defendant may be discharged from imprisonment under the order of arrest.

GOODYEAR *against* BROOKS.

New York Superior Court; General Term, April, 1866.

REFERENCE.

The power conferred by the statute (*Code*, § 271), to refer actions involving the examination of a long account, is intended more for the convenience of the court, than as conferring a right on the parties

Goodyear v. Brooks.

The difficult questions of law, intended by the statute, are not merely those arising out of the facts presented by the issues in the case, but include questions growing out of the very character of the issues, such as questions of evidence on an issue of fraud.

In the case of an action to foreclose chattel mortgages, where the defense was that the mortgages were fraudulent,—*Held*, that the necessity of proving good faith and honest intent, would probably raise difficult questions of law, and, therefore, the case was not one which should be referred.

It seems, that proof of an intention on the part of the defendants to apply for a trial of the issues by a jury, is not of itself, an objection to granting the plaintiff's motion for an order referring the cause to a referee.

An action for the foreclosure of a mortgage is not in a condition to have all the issues therein referred, while any defendants, against whom the plaintiff seeks a judgment over for a deficiency, have not been served with summons, or have been served with a notice that no personal claim is made against them, and have not appeared.

Appeal from an order of reference.

This action was brought by Charles, George, and George W. Goodyear and Henry Durand, against Edwin A. Brooks, and ten other defendants.

The action was brought to foreclose two chattel mortgages, alleged to have been given by the defendant Brooks to the plaintiffs, to secure a large sum of money alleged to be due to the plaintiffs, part of it from the defendant Brooks, and part of it from the firm of Church & Brooks, which consisted of the defendant Church and the defendant Brooks. A judgment for a deficiency was only asked against both of these defendants.

The only defendants who appeared and answered, were judgment creditors of the mortgagor Brooks (claiming in their answers an interest in and lien upon the property alleged to be covered by the mortgages, under execution levied by them against Brooks), and the sheriff of the city and county of New York, by whom the executions were levied.

These defendants also claimed in their answers that the mortgages were fraudulent, illegal, and void.

The plaintiff, upon affidavit of one of his attorneys that the trial of the action would involve the examination of a long account, that the claim of the plaintiff secured by the mortgages was made up of numerous transactions had by the plaintiffs as brokers of the defendants, the items of which were very

Goodyear v. Brooks.

numerous, and that there were numerous items of credits, the examination of which was necessary to ascertain the amount due, obtained an order from a judge of the court at special term referring the issues in the action to a referee, to hear and determine the same.

The defendants, in their affidavit to oppose this motion, alleged that the mortgages were fraudulent, that the defendants had a good defense, that the issues would involve much contradiction, questions of veracity, and various questions of fraud and that it was the intention of the defendants, as soon as the action should be at issue with respect to all the defendants, to move that the issues of fact be sent to a jury for trial, and further, alleged on belief that if, on the trial, the issues should be found in favor of the defendants, no examination of an account would be necessary: that the trial would involve the decision of difficult questions of law: that the action was not at issue with respect to all the defendants.

From the order of reference, the defendants appealed.

George H. Paine, for the respondents.—I. This cause was in readiness for trial as to all the defendants, that have answered. All the defendants, but the defendant Church, had been served with the summons, and had answered, or were in default.

The complaint alleges, as the ground of liability of Church, that he was a partner of the defendant Brooks. Therefore, the plaintiffs were right in moving the cause to trial, without serving the summons on the defendant Church (*Code*, § 136, subd. 1).

II. It was objected, on the argument of the motion, that the affidavit on which the motion was made should have been made by the party. There is but one case, sustaining this objection (2 *How. Pr.*, 7; Dec., 1845), and no reason is given for the rule. Since the Code, the common practice has been to move on the affidavit of the attorney, without stating why it was not made by the party.

III. It appears from the complaint and from the affidavit that the trial of the action will involve the examination of a long account. This question having been decided at special term, will

Goodyear v. Brooks.

not be disturbed on appeal. It is not an appealable order (*Bryan v. Brennon*, 7 *How. Pr.*, 359; *Dean v. The Empire State Mutual Ins. Co.*, 9 *How.*, 69).

IV. It is claimed that this cause involves difficult questions of law, and the affidavit read in opposition to the notice sets forth the grounds of the defense, to wit: that the mortgages set forth in the complaint were "made with the intent to hinder, delay, and defraud" the creditors of the defendant Brooks; and the fraud alleged is an agreement not contained in the mortgages themselves, that they should not be filed, and that Brooks should continue his business as usual. This question of fraud, on the facts alleged in this affidavit, is a question of fact, and not of law (5 *Rev. Stat.*, 5th ed., 225, § 4; *Conkling v. Shelley*, 28 *N. Y.*, 360; *Ford v. Williams*, 24 *N. Y.*, 359).

V. Plaintiffs may proceed to judgment without service on the defendant Church (*Code of Procedure*, §§ 136, 274; 21 *N. Y.*, 300).

VI. An action of the class formerly maintainable in chancery may be referred, when an issue in it involves the examination of a long account, the same as any other action. 1. The court may order a reference in the following cases of its own motion, or on application of a party. "Where the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein" (*Code of Procedure*, § 271, subd. 1). 2. The powers of referees to decide the whole issue in an equitable action are ample. The Code, § 272, provides that "The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon, in the same manner as if the action had been tried by the court" (*Palmer v. Palmer*, 13 *How. Pr.*, 363). 3. "The distinction between actions at law and suits in equity, and the forms of all such actions heretofore existing are abolished, and there shall be in this State hereafter but one form of action for the enforcement of private rights, and the redress of private wrongs, which shall be denominated a civil action" (*Code*, § 69). 4. In *Jackson v. De Forest* (14 *How. Pr.*, 81), the court of its own motion referred the whole issues in an equitable action be-

tween partners. In *Mills v. Thursby* (11 *How. Pr.*, 113), Justice MITCHELL referred a similar cause on motion. It was held at general term of superior court (3 *Sandf.*, 739), that the Code authorizes a reference in all *actions* whatever.

VII. It is well settled, that an order which directs a reference of an action which the court has power to refer is not appealable (7 *Bosw.*, 680).

Cram & Robinson, for the appellants.—I. This order is an appealable one. An order which directs a reference in a case in which a reference is not authorized is appealable. *Cram v. Bradford*, 4 *Abb. Pr.*, 193; *Dickinson v. Mitchell*, 19 *Abb. Pr.*, 286.

II. A court and jury is the proper tribunal for the trial of the issues in this action. This action is brought to foreclose two chattel mortgages, and the issues raised by the answers of such of the defendants as have appeared relate entirely to the validity of these mortgages. Should these mortgages be held invalid, that will be an end of the plaintiffs' case, and no examination of any account whatever will be necessary. Under these circumstances, a reference is improper. It subjects the parties to the increased delay, labor, and expense of an accounting before a referee, which the event may show to have been utterly unnecessary for the disposition of the case. It will be time enough to order an accounting, which in this case would be peculiarly long and laborious, when the validity of these mortgages has been determined, and it would be unjust and oppressive to do so, while that question remains to be tried. It was the intention of § 271 of the Code of Procedure never to compel a reference, except in cases in which the court could clearly see from the pleadings and proceedings that the trial must directly and necessarily involve the examination of a long account. In *Graham v. Golding* (7 *How. Pr.*, 260), it was held that, where the necessity of examining a long account depends upon the decision of another issue in the action, as whether a partnership existed, a reference will not be ordered until that issue has been first tried. Per DEAN, J.: "Until it is known that there is a partnership, it cannot be said in this case that the trial of the issue of fact in this case will involve the examina-

tion of a long account. * * * The general rule, therefore, must prevail that the question of partnership be first settled by an issue, or by the court, before a reference can be ordered by the court." And so in *Keeler v. The Plank Road Company* (10 *How. Pr.*, 11), a reference was refused for the same reasons. Per DEAN, J. : " But even if the plaintiff's view of the case is correct, before it can be established, that issue is to be tried, and then, if decided in the plaintiff's favor, it may be necessary to examine the accounts of the parties. If the issue is found for the defendants, then no accounts are to be examined. A reference can only be compelled when the court can see by the pleadings or other papers of the parties that the trial of the cause must necessarily involve the examination of a long account on either side." In *Cameron v. Freeman* (10 *Abb. Pr.*, 333 ; S. C., 18 *How. Pr.*, 310), a reference was denied, the court, per HARRIS, J., holding : " That where it was denied that one of the defendants, to whose rights the plaintiff had succeeded, was ever interested as a partner in the transactions in respect to which an account was sought, this issue must be established in favor of the plaintiff before an accounting can be necessary. And whether the transactions in which it was alleged that such plaintiff had an interest were settled and closed with another defendant as one of the partners, this issue, too, would have to be determined against the defendants before the plaintiffs would be entitled to an accounting for any amount which might be due him." 2. It is also evident, from the pleadings and affidavits, that the investigation of these issues will require the decision of difficult questions of law, and in such cases the court has no power to order a reference (*Code*, § 271 ; *De Hart v. Covenhoven*, 2 *Johns. Cas.*, 402 ; *Codwise v. Hacker*, 2 *Caines*, 251 ; *Low v. Hallet*, 3 *Caines*, 82 ; *Adams v. Bayles*, 2 *Johns.*, 374 ; *Ives v. Vandewater*, 1 *How. Pr.*, 168). 3. Besides, as these mortgages are attacked on the ground of fraud, as all the issues involve that charge, and the whole defense rests upon it, the defendants have a right to a trial by jury, and a reference cannot be compelled. On this ground an order of reference was reversed in *Freeman v. The Atlantic Ins. Co.* (13 *Abb. Pr.*, 124 ; *Supreme Court, General Term*, 1861). See also *Levy v. Brooklyn Fire Ins. Co.* (25

Wend., 687), and title three, part two, chapter seven, section four of the Revised Statutes (5th ed., p. 225), which provides that, in cases like this, the question of fraudulent intent shall be deemed a question of fact, and not of law. In *Clark v. Brooks* (26 *How.*, 285), an action for an accounting between partners, in which, however, one of the issues was as to the amount of the interest of one of the partners, the court sent this issue to a jury for trial, although the application was not made within ten days after issue joined, as provided by Rule 23 of the court.

III. In this case the pretended mortgages are alleged to have been given partly to secure the firm account of the alleged partnership of Church & Brooks, consisting of the mortgagors, Edwin A. Brooks and Harvey Church. Brooks has been served with a notice of no personal claim, and has not appeared; but Church, an equally necessary party, although made a defendant, has neither been served with process, nor appeared in the action. Under these circumstances, the cause not being at issue, or ready for trial, with respect to all the defendants, who are necessary parties, the court has no power to order a reference. "Motion for a reference denied because it did not appear from affidavit that issue had been joined in the case." (*Jansen v. Tappen*, 3 *Cow.*, 34). A motion for reference was denied in *Dutcher v. Wilgus* (2 *How. Pr.*, 180), because it did not appear sufficiently from the affidavit that issue was joined in law, which was requisite as well as in fact. "The old rule requiring an issue of law or fact to be joined in regard to every defendant except those who are defaulted before the cause could be brought to argument, has never, to my knowledge, been abrogated, and as long as legal proceedings retain any degree of consistency or symmetry, it never can be disregarded" (Per BARCULO, J., *Burnham v. De Bevoise*, 8 *How. Pr.*, 159). "An action cannot regularly be brought to trial until it is in such a situation that a final judgment can be rendered between all the parties" (*Ward v. Dewey*, 12 *How. Pr.*, 193). If brought to trial upon the answer of part of the defendants only, when the others have not been served with process, or appeared in the action, the court will not permit the action to proceed. "The defendant who has not appeared or been

served, is not before the court.

* * * * *

A complete determination of the controversy cannot be had without the presence of the third defendant; service of summons upon him, or his appearance in the action, is indispensable" (Per BOSWORTH, J., *Powell v. Finch*, 5 *Duer*, 666). And in *Hawkins v. Avery* (32 *Barb.*, 551), it was expressly held by the general term of the supreme court in this district that where there are some of the parties defendants in an action who have not been served with process, the action is not referable, and that the proper place to take the objection is on the motion to refer. Per ALLEN, J.: "But a perfect answer to the objection taken by the defendant to proceeding to trial before the referee until the other parties were served with process is that the objection related solely to the regularity to the reference, and made no part of the trial, and is not, therefore, the subject of exception. If the above action was not in readiness for trial, it was not referable (*Code*, §§ 270, 271). and the objection should have been taken on the motion to refer. The court then adjudged, if the parties did not concede, that the cause was at issue and in a condition to be tried, and the referee, who was only charged with the trial of the issues, could not overrule the action and decision of the court under whose appointment he acted."

IV. The issues in this case being proper issues to be tried by a court and jury, the court would order them so to be tried on the application of either party within ten days after issue joined. It was the intention of the defendants to apply for such order as soon as issue should be joined. They had no power to apply before, and the order of reference made before issue joined cut the defendants off from even the possibility of making such application, and deprived them, by no fault or *laches* of their own, and without even a hearing, of the rights of having these issues passed upon by a jury.

The order of reference should, therefore, be reversed, for the reasons already given, and for the additional purpose of allowing the defendants, at the proper time after issue joined, to make this application for a jury trial in a case in which it is eminently proper that it should be granted.

Goodyear v. Brooks.

By THE COURT.*—ROBERTSON, Ch. J.—The necessity of deciding difficult questions “in the investigation” is expressly excepted from the grant of authority to courts to direct references of all the issues in an action to a referee to be tried, in case their trial requires the examination of a long account (*Code*, § 271).

The grant itself is, at most, permissive, not peremptory, and evidently intended more for the benefit of the court, than as a right of the parties, since it is allowed to exercise the power on its own motion. The questions of law which may be so required to be decided, are not confined to those arising out of the facts presented by the issues in the case; they may grow out of their very character, and the evidence necessary to their investigation. In this case the questions of law, in regard to the good faith and honest intent of the chattel mortgages held by the plaintiffs, may be very simple, and yet offers of evidence may raise very difficult ones. The answer, however, besides charging generally, that such mortgages were executed with intent to interfere with the collection by the other defendants, of their claims against Brooks, alleges an entire want of consideration for them, secrecy in their execution, and a continued possession of such chattels by the defendant Brooks, after such execution. This, which is not denied in any paper before us, throws on the plaintiff the burden of proving good faith and honest intent in executing such mortgages (2 *Rev. Stat.*, 137, § 4). And although such intent is made by the statute a question of fact and not of law, such good faith is not; the statute intended by it something besides the intent, and was evidently designed to cover cases where, although the mortgagee had an honest debt, and his sole desire was to secure it, he allowed himself and it to be knowingly used to keep other creditors at bay.

But even if the statute meant precisely the same thing by “good faith” and “intent not to hinder, delay, or defraud,” courts have made out of matters appearing on the face of an instrument, questions of law as to fraud. And even if the only questions on the main issues were questions of fact, in addition to determining such questions as to the good faith and intent,

* Present, ROBERTSON, Ch. J., and BARBOUR and GARVIN, JJ.

Goodyear v. Brooks.

yet, the relevancy of evidence offered and its sufficiency to establish them when in issue, may present difficult questions of law.

The mortgagee of course cannot introduce every thing he thinks proper, by way of proof of his honesty. Whatever is offered must have some legal, direct bearing on the questions at issue. A just debt to be secured, undoubtedly lies at the bottom of such proofs, but the mere necessities or convenience of the mortgagor have been held not to be sufficient, alone, to go to a jury as evidence of such honesty of intention (*Doane v. Eddy*, 16 *Wend.*, 523; *Randall v. Cooke*, 17 *Id.*, 53). No rule has, however, been established as to any other circumstances. The fact that a jury is to pass upon the evidence of circumstances showing good faith, does not render the question of its admissibility less difficult of solution, or take away the necessity of the regulation of its admission by an experienced judge, instead of a referee, who is only required to possess the skill necessary to examine a long account. The fact that referees may and often do possess equal skill and experience does not alter the theory and object of the statute to leave litigation to the determination of ordinary tribunals created for the purpose, unless there is special necessity for the use of others. Unless the plaintiff in this case can prove his good faith and honest intent, he must fail at the trial, and the introduction of evidence for the purpose will most probably raise difficult questions of law.

I am not prepared to say that proof of an intention on the part of the defendants to apply for a trial of special issues in the action by jury, as provided in the 254th section of the Code would, of itself, even if proved, render an order for a trial by a referee of all the issues erroneous, because I see no obstacle to authorizing such mode of trial, notwithstanding such order of reference.

The latter may in all cases be applied for and obtained immediately after issued joined, or at any time afterwards; the former may be done upon a notice given ten days after issue joined, beside which full time is allowed for the settlement of such issues, if granted (*General Court Rule 33*). If the motion to refer can cut off that right, then the mere intent to apply ought to be sufficient to require the order of reference to be made *conditional*, unless such application be made within some

Goodyear v. Brooks.

specified time; but I cannot think the granting absolutely of an order of reference cuts off that right. If such issues were of the kind, that their determination would dispose of the case so as to render the taking of an account at all unnecessary, the rule would apply that the examination of a long account being unnecessary, a reference would be equally so (*Graham v. Golding*, 7 *How. Pr.*, 260; *Keeler v. Plank Road Co.*, 10 *Id.*, 11; *Cameron v. Freeman*, 18 *Id.*, 310; S. C., 10 *Abb. Pr.*, 333).

I think, however, there is another objection in this case to a reference of all the issues. While the plaintiff has joined as a cause of action with his claim under the chattel mortgages, a personal liability of the defendants Brooks and Church for moneys advanced, he only prays for judgment against them for any deficiency in the amount so claimed, after applying the proceeds of the mortgaged property in satisfaction; but as appears by the affidavit of the attorney for the defendants he has served upon the defendant Brooks, besides a summons, a notice that no personal claim is made against him, while he has not served any summons at all on the defendant Church. Even, therefore, if the plaintiff can proceed in this action against the defendants Brooks and Church to recover judgment against them under the 136th section of the Code, notwithstanding his notice that he made no personal claim against them, and if a judgment for a deficiency in an action for the foreclosure of a mortgage comes under the section last named, I do not see how the action is in a condition to have the liabilities of such two defendants determined on the trial of *all* the issues therein before a referee, so as to have judgment and execution against the joint property of Church and Brooks. Assuming also Church to be a proper party to an action to which the defendants who are creditors of Brooks are made parties merely as having subsequent claims to that of the plaintiff upon the mortgaged chattels, and that the determination of his liability, or its amount, must be simultaneous with that of the rights of such defendants, since there can be but one trial and judgment in the action, it is not very clear how such trial can be had, or judgment given, until *Church has been brought before* the court. The first subdivision of such 136th section is a mere re-enactment of a previous statutory provision (2 *Rev. Stat.*, 377, § 1), and could

hardly have been designed to reach further than *it* did, although possibly by the reduction of forms of action, and jurisdictions, courts to one comprising equitable as well as legal forms and jurisdictions, joint liabilities may be embraced by it. It could not have been intended to extend to cases, where an action for such liability was joined with one where other causes of action were to be passed upon, other equities settled and relief given, besides such joint judgment. Section 375 of the Code permits an entirely new litigation of any liability of the joint contractors not served, involving of course the question of the validity of the mortgages. There is no good reason for omitting to serve a party, if a resident, personally, or if absent, by publication, where the defendants have equities as between each other, except in an action on a joint liability, and the recovery of a simple judgment for the amount due upon it against joint contractors. The only reference that could have been ordered in this action, if Brooks and Church had been the sole defendants, and the former, having alone been served with the summons, had not appeared or answered, would have been one to take an account or proof of some particular fact necessary to enable the court to give judgment (*Code*, § 246, subd. 2). As there can be but one trial and judgment in the action, the referee, as a substitute for the court or jury, must assess the amount due from Brooks and Church as part of such judgment; yet no authority to do so is given him by the order of reference in question. Besides, the referee can only try the issues made by the pleadings in the action, and has no authority to determine equities between the defendants, under section 274 of the Code, or dispose of the costs.

There is no reason why any property held jointly by Church and Brooks, therefore, should be charged under an execution with the costs of the litigations respecting the validity of the mortgages given by the latter. While Church remains a party on the record, and is not brought in, the cause must be considered as not at issue as regards him, and, therefore, not in a situation for a reference to dispose of all the issues (*Jansen v. Tappen*, 3 *Cow.*, 34; *Dutcher v. Wilgus*, 2 *How. Pr.*, 180; *Burnham v. Debevorse*, 8 *Id.*, 159; *Ward v. Dewey*, 12 *Id.*,

Wright v. Evans.

193; Powell v. Finch, 5 *Duer*, 666; Hawkins v. Avery, 32 *Barb.*, 551).

For these reasons, the order appealed from should be reversed, without costs to either party.

WRIGHT *against* EVANS.

New York Common Pleas; Special Term, January, 1867.

INJUNCTION.—COVENANT NOT TO BUILD.

A covenant not to erect a "building" within a certain distance from a boundary line may be held, on evidence of the circumstances under which the covenant was made, to preclude the covenantor from erecting a fence, which would have the same effect in respect to shutting off light and air.

An injunction may be granted to restrain the covenantor from erecting such a fence.

Motion to dissolve injunction.

This action was brought by Mrs. Emma L. Wright against Silas G. Evans.

The complaint alleged that the plaintiff was owner of two lots known as No. 226 Madison avenue, upon the rear of which there was a house and lot fronting on Thirty-eighth street, in which plaintiff resided. That in April, 1865, the plaintiff entered into a contract to sell the defendant one of the lots on Madison avenue adjoining the premises on Thirty-eighth street, occupied by the plaintiff as her residence. This agreement of sale contained a stipulation that the deed of said lot should contain "a restriction against erecting any building on the same within fifteen feet of the rear line, and the usual restrictions against nuisances."

The complaint further alleged that on the premises, No. 226 Madison avenue, was a valuable house belonging to the plain-

tiff, with windows in the rear, on the side looking out upon the open space or yard in the rear of the defendant's house. That the front part of the plaintiff's lot, extending back within thirty feet of the rear, was an open yard. That the rear part of the plaintiff's lot was occupied by a house twenty-four feet four and a half inches (the width of the lot) by thirty. That the front part of the defendant's lot was covered by the defendant's house, extending back eighty feet to the rear part of the defendant's lot, which was an open yard area. That all the surrounding buildings were built up in such a manner that it was impossible to light the plaintiff's building on the side adjoining the defendant's yard, except from windows looking out the side of the yard; and that, at the time the plaintiff sold the lot on Madison avenue to the defendant, the windows in the plaintiff's building were constructed the same as they now were, and the plaintiff derived the light by which to light her house from the same source, the light passing across the open yard in the rear of the lot sold to the defendant.

The plaintiff further alleged that it was expressly understood and agreed between the parties, at the time of the sale, that the defendant should not, under any circumstances, obstruct the lot in the rear of the plaintiff's dwelling, nor permit any nuisance in the yard, nor erect any building or structure in the yard within fifteen feet of the plaintiff's dwelling, to the end that the plaintiff should at all times have and enjoy free and uninterrupted light of said windows. That the defendant had, within a few days, placed boards and other material in the yard, and threatened to build, and was erecting a wall or fence or building, directly in front of the windows in the plaintiff's dwelling, in such a manner as totally to destroy the lights, and to destroy the plaintiff's building as a dwelling.

The answer of the defendant denied the principal allegations of the complaint, and alleged that the covenant on the subject which the deed contained, was simply a covenant against nuisances with the words, "no building to be erected within fifteen feet of the rear of said lot."

Amos G. Hull, for the plaintiff.—I. The covenant in this case is sufficiently broad to cover any building or part of

Wright v. Evans.

a building, or structure connected with the building. The intent of the restriction in this covenant is manifest from the circumstances which surround it. It is clearly manifest from the pleadings, the affidavits, and the covenant itself, that the restriction could not have contemplated anything else, except the admission of light and air. "Covenants are to be construed according to their spirit and intent" (*Quackenboss v. Lansing*, 6 *Johns.*, 49). Technical words are not necessary to a covenant. Any words will be sufficient which will show the intention of the parties (*Cruise's Digest*, vol. 4, p. 393, title Deed, chap. 25, § 5). If the intention of the parties is clear, that intention must prevail against the strict meaning of the words. "*Qui hæret in literi, hæret in cortice*" (*Jackson v. Myers*, 3 *Johns.*, 388; *Moore v. Jackson*, 4 *Wend.*, 58; *Roberts v. Roberts*, 22 *Id.*, 140). "*Benigne sunt faciendæ interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat.*"

II. The answer does not deny but that the deed which the defendant alleges was made July 25, 1865, contains the same restrictions contained in the contract, the deed not being on record, and the plaintiff being unable to ascertain what she did sign, and not knowing but that the deed contains the same clauses as are set forth in the contract, and nothing being alleged to the contrary in the answer, and being thereby unable to ask a reformation of the deed until she can be advised what she has signed. A court of equity will protect the plaintiff under her contract for a reasonable time, to the end that she may reform the deed, and make the same conform to the original and true and correct agreement between the parties.

III. But the defendant in this action admits the existence of the restrictive covenant, and puts his case on the construction of the word "building." But the literal meaning of the term is not to prevail against the manifest intention of the parties. The construction of a wing, or wooden wall or stone wall twenty feet high, and as an appurtenance to the main building, is as much a part of the building, and is to be deemed as much a component part thereof as any rafter or beam within the same. Such a building violates the covenant as much as though the whole body of the house was placed back upon the restricted ground. Such a structure is in no sense a *fence*. It

is an abuse of language to call it a *fence*. Defendant's answer calls the structure a fence.

Henry Hilton, for the defendant.—I. (2 *Parsons on Contracts* [5th ed., A. D. 1864], p. 538, note q). "Words of exception or reservation in any instrument are regarded as the words of the party in whose favor the exception or reservation is made (10 *Coke*, 106, b. 2; *Compt. & J. [Engl. Excheq.]*, 244, 251; 2 *Sumn.*, 366, 381; 1 *Story*, 360). And they would be construed against such party (*Id.*; 2 *Barnw. & C.*, 197; 5 *Id.*, 842; 3 *Johns.*, 389; 11 *Id.*, 191; 9 *Geo.*, 497).

Borst v. Empie, 1 *Seld.*, 40: "Is the use of the water restricted to the business of the tannery?" [The clause was: The (plaintiffs) grantors do reserve to themselves and their use (*sic*) a certain well and waterworks, laid down for the purpose of supplying the tannery aforesaid with water.] "In determining this point, which is the important one in the case, we are to hold to a strict construction of the words of the reservation as against the party whose words they are, and against the plaintiff in this cause, who stands in the place of that party; and if an advantage can be gained from any uncertainty or ambiguity in the words, the defendant is entitled to the benefit of it" (1 *Preston's Sheppard's Touchstone*, 88; 3 *Johns.*, 387; 8 *Id.*, 400; *Jackson v. Gardner*).

Ives v. Van Auken, 34 *Barb.*, 566. "This is most clearly a reservation, and not an exception [the words were 'reserving a privilege in the well,' &c.], and the question presented depends upon the construction to be put upon the reservation. The rule of law construing such a reservation, is to hold to a strict construction of the words of the reservation, as against the party whose words they are. And so strict is the rule in this respect that if any advantage can be gained from any uncertainty or ambiguity in the words, the party making the reservation is not entitled to it, but the party against whom the reservation is made is entitled to it" (Citing *Borst v. Empie*, 5 *N. Y. [1 Seld.]*, 40, &c., *supra*).

Hilliard on Easements (chap. 27, Easements), p. 444. "The language claimed to establish an easement of this nature will be construed strictly." Thus a covenant that no building except monuments and tombs should be erected on the land

Wright v. Evans.

lying on the east side of a street, and opposite the land conveyed, was construed to restrain building only exactly opposite Wood, V. C., saying, "if the words were doubtful, and it could be construed in favor of the defendant (the covenantor) the general rule would be this, that it being equivalent to a grant on the part of the vendor, the construction must be taken most strongly against the grantor" (*Patching v. Dubbins*, 1 *Kay Ch.*, 13, 14).

If the plaintiff's construction is correct, the *defendant* has only a right of way and a right of prospect over the fifteen feet of the rear of his premises. "For if he could not enclose any portion of it he could not use it permanently in any other way without encroaching on the plaintiff's rights. If this had been the intention of the parties, they would naturally have carried it into effect by a simple conveyance of a right of way and prospect to the defendant on the fifteen feet (*Jackson v. Allen*, 3 *Cow.*, 220).

DALY, F. J.—It is to be taken for granted, that the deed, which has not been put upon record, but is in the defendant's possession, has the covenant which, by the contract of sale, was to be contained in it.

The structure which the defendant was about to erect, a wooden fence, twenty feet high, extending from the defendant's south wall to the rear of his lot, is, in my judgment, "a building" within the meaning of the covenant. In construing a word like this, in an instrument, we are not confined to its strict and literal meaning, but it is to be taken in the sense which the parties intended, and what they intended is to be gathered from the whole instrument and the subject matter (*Jackson v. Myers*, 3 *Johns.*, 395; *Platt on Covenants*, 136).

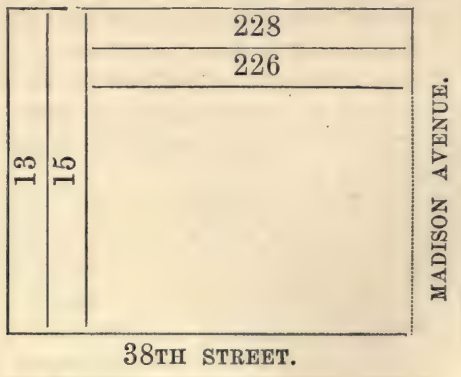
"The law," says BACON, "will rather do violence to the words, than break through the intent of the parties" (*Bac. Abr. Leases*, K). Following this rule of construction, there is no difficulty in ascertaining what the parties meant by the restriction "against erecting any building within fifteen feet of the rear line" of the lot sold to the defendant.

When the contract for the sale of this lot was made, there was upon the rear of the adjoining lot, which belonged to the plaintiff, a building which was used in connection with a house

Wright v. Evans.

in 38th street, belonging to the plaintiff's husband. The lower story of this building was a laundry, and the upper one a green house, and the laundry was lighted by a window looking out upon the lot sold to the defendant. When the plaintiff in her contract of sale, therefore, provided that no building should be erected within fifteen feet of the rear line of the lot which she sold to the defendant, the manifest intention was that the space should be left open, to afford light and air upon that side to the building on the rear of her adjoining lot.

This is obvious, not only from the situation of the premises, but from what was done immediately afterwards. The contract was entered into in the month of April, 1865, and in the summer following, about or very soon after, the time, when the defendant began to excavate for the building which he has erected upon his lot, the building on the rear of the plaintiff's lot was changed into a dwelling house, by extending the front of it ten feet towards Madison avenue, by adding another story, and by closing the openings which had previously connected it with the house in 38th street; a change which was probably contemplated when she sold the adjoining lot to the defendant. She purchased both lots in the year 1856, and her husband purchased two lots on 38th street, the rear of which adjoined the rear of the plaintiff's, as indicated in this diagram.



In 1859, the plaintiff's husband erected two costly dwelling houses upon his lots in 38th street, occupying one of them, No. 15, as his residence; having in connection with it, the green

Wright v. Evans.

house and laundry before referred to, on the rear of his wife's lot, No. 226 Madison avenue. In the summer of 1865, he changed the green house and laundry into a dwelling, which was done before the defendant had put up the walls of his building, and this alteration having been completed in September, the plaintiff's husband took possession of the premises as his dwelling house, where he still remains, and in the fall of the year, he sold his house and lot on 38th street. In making the alteration, the walls were left as they had stood, so that the wall of the original building, now forms the dividing line of the front and rear rooms of the house as it has been altered, which is a building twenty-four by thirty feet, having windows looking out upon the open space upon the rear of the defendant's lot. It extends thirty feet from the rear of the lot, and the space in front of it, towards Madison avenue, is an open yard. By the terms of sale, the deed of the defendant's lot was to be delivered to him on the 29th of May, and he probably received it about the time, for in the August following he began to erect his building, which he set fifteen feet forward from the rear line of his lot, extending it eighty feet towards Madison avenue.

The situation of the premises, as I have said, when the contract for the sale of the defendant's lot was entered into, and the acts of the parties immediately thereafter, indicate very plainly what was their mutual understanding as to the nature of the restriction which the plaintiff imposed, when she contracted to sell the lot; and if the defendant were allowed to do what he has been enjoined by the court from doing, it would practically deprive the plaintiff of the benefit which she intended to secure by this covenant in her deed.

It appears by the affidavit which she has submitted, that the first story, which is now used for a kitchen, is lighted in the same way that it was before the alteration was made, and that there is no way of lighting it, except from the rear of the defendant's lot: so that this part of the dwelling would be as effectually deprived of light, and I might almost say, of air, as if, instead of the wooden fence, the defendant were to erect in the open space in the rear of his lot, what might be technically denominated 'a building' of a corresponding height with that of the proposed fence.

It is very clear to my mind, that to allow him to put up this fence would be in direct contradiction of the intent of the parties as expressed in the instrument, and I am, therefore, of opinion that the injunction was properly granted.

THE PEOPLE, *on the relation of* WOOD, *against*
CONNOLLY.

Supreme Court, First District ; At Chambers, February, 1867.

MANDAMUS.—MUNICIPAL CORPORATION.—ABATEMENT OF ACTIONS.

It seems, that a mandamus may be granted to compel the clerk of a municipal corporation to execute a contract under the seal of the corporation.

A suit brought by a public officer, as such, is abated by his going out of office ; but the abatement is but a temporary disability, and if there is any successor the action might be revived. Hence, an injunction existing in such an action is not to be deemed as no longer in force, when the plaintiff goes out of the office, but it must be set aside.

A mandamus is not to be granted against the city of New York to compel the payment of a claim, unless it clearly appears that there is money in the treasury appropriated to the purpose. Otherwise the remedy must be by action.

Application for mandamus.

In December, 1865, the common council of the city of New York, by a resolution approved by the mayor, directed the comptroller of the city, the defendant in this case, to execute a lease of premises in Nassau street, belonging to Mr. Wood, the relator, for the sum of \$18,000, per annum, for a term of years, for the use of officers of the city corporation. The relator accepted the terms fixed by the resolution, and prepared leases which he procured to be approved by the corporation counsel, and tendered them to the comptroller for execution. He notified that officer, at the same time, that he should consider the continuance of occupancy by the city officers as an acceptance of the lease. The comptroller declined to execute the lease, although the officers of the corpora-

People *ex rel.* Wood *v.* Connolly.

tion, who were in possession of the premises, continued to occupy them.

In December, 1866, Mr. Christopher Pullman, who was then a member of the board of common council of the city, brought an action against the mayor, the comptroller and the relator in these proceedings, to enjoin them from executing the lease in question. An injunction was obtained and served, and so far as appeared, had not been vacated at the time of the present proceeding.

On the 8th of January, 1866, the mayor of the city commenced an action in the supreme court against the comptroller, alleging that the resolution under which this lease had been authorized by the common council was corruptly passed, and praying that it be set aside and declared void.

Mr. Wood, the lessor, now applied to the court for a mandamus against the comptroller, to compel the execution of the lease and payment of the rent for the three quarters which had elapsed.

William F. Allen, for the relator, insisted that the expiration of the term of office of Mr. Pullman, the plaintiff in the injunction suit, which had occurred since he obtained an injunction against an execution of this lease, had the effect to render the injunction of no further force.

Aaron J. Vanderpoel, for the respondent, the comptroller,—Objected that the mandamus did not allege that the claim had not been audited, as was required by a recent statute, and that a mandamus was not the proper remedy to compel the payment of a debt by a municipal corporation; the remedy, if any, in this case must be by action.

I. T. Williams, for the corporation of the city.—I. It is alleged in the return and admitted, that an injunction was obtained by Pullman, forbidding the comptroller and his successors from executing the laws in question. The statute, giving such officer the right to sue, must be considered as not limited to his term of office. In order to give the statute effect it must be construed as by implication, giving him the right to continue the action after the expiration of his term of office. What would entirely abate a suit at law, will, in equity, have only the effect of suspending the proceedings, which a bill of

revivor under the old practice, and, perhaps, merely a motion under the new, will remove, permitting the parties to proceed as before. (*Mitf. Eq. Pl.*, 57; *Story's Eq. Pl.*, § 354.) The death of the plaintiff in an equity suit would not have been the effect to dissolve an injunction (*Eden on Inj.*, 158).

II. The return sets forth the pending of an action in this court in equity, brought by the corporation of the city of New York against him as comptroller, to set aside the resolution in question and declare it null and void, and to perpetually restrain and enjoin the respondent from executing the lease or the payment of any moneys as rent for the premises in question, on the ground that the same was fraudulently procured and approved. If anything be settled, it is settled past dispute that when a court of competent jurisdiction has got jurisdiction of any matter of dispute, such jurisdiction is exclusive as against all recognizance of such matter by any court whatever, in any suit or proceedings which may be thereafter instituted. To this principle it is believed no single exception can be found in the annals of jurisprudence. So universal is it that it prevails not only as a principle of law, but it is adopted by the supreme court of the United States as a principle of comity (*Taylor v. Carryl*, 20 *How.*, 583). A disregard to this rule of jurisprudence, would in every imaginable case be most injurious as leading not only to a conflict of jurisdiction, but to the most dire and inextricable confusion. No case will illustrate this better than the present. The corporation files a bill to set aside what is claimed to be a contract, for fraud. Pending the action, the defendant, upon a notice of eight days, brings the complainant before a judge at chambers, demanding an execution of the contract and payment thereunder. The relief the corporation ask is attainable only in a suit in equity. It is a bill filed to set aside a pretended contract for fraud. It may be deprived of a trial in that court by the summary action of its antagonist, and confined to the scanty relief or no relief attainable upon the return of an alternative writ of mandamus. Suppose the relief here asked by the relator were to be granted, he may plead these proceedings *puis d'arrien* continuance in that action as a flat bar, and thus deprive the corporation of a trial in that court where alone such wrongs as it complains of are cognizable and returnable. The human mind shrinks from

People *ex rel.* Wood *v.* Connolly.

such a spectacle of perverted justice. That the doctrine here contended for is applicable as well in a case of an alternative mandamus as in other actions or proceedings is settled in the case of *Rex v. De Hay*, 4 *Burr.*, 2295.

III. There being no statute or ordinance imposing upon the comptroller the duty of renewing leases, or any similar duty, he could not be compelled, even at the suit of the common council, or by the corporation itself, to do the acts by the alternative writ required, much less can he be compelled to do so by an individual or mere stranger, to whom he owes no duty or allegiance whatever. No such duty is imposed upon the respondent by law or ordinance. The only allusions to the subject that in any way bear upon it are, 1st, section 10, chapter 3, of the Revised Ordinances, which is as follows: "He" (the comptroller) "shall cause all grants, leases, and counterparts of leases, or deeds executed by the corporation to be recorded in the proper books to be kept in his office." Thereby clearly implying that the duty of executing rests with the corporation or elsewhere than with himself. His duty in reference to leases is confined to the recording them in proper books to be kept in his office. Again, section 36 of the act of 1857, provides that "the clerk of the common council shall keep the seals of the city, and his signature shall be necessary to all leases, grants, and other documents, as under existing laws." From which it appears that the comptroller has no power to obey the mandate of the alternative writ, namely, to "execute and deliver" the lease demanded. Thus a portion at least of such duty is by this express statute confided to another functionary. If the comptroller is bound by law, by any general principle of law, to do the work assigned him by the resolution in question, then by the same general principle of law, he is bound to do whatever the common council may require him to do. But were it otherwise, and were it true that the respondent is bound to do every and all things which the common council by resolution direct him to do, yet how could the relator take advantage of a duty not enjoined by law, not due to him, but simply existing between the common council on the one side and the respondent on the other? If such a duty exists as between the present comptroller and the present board of the common council, how can it be pretended that the pres-

People *ex rel.* Wood *v.* Connolly.

ent comptroller owes any such duty to a former board, now extinct? Is there anything to show that the present board desire the comptroller to execute such a lease? This question was raised in the case of *People v. Brennan* (39 *Barb.*, 522), and it was then claimed that the presumption was that the proceeding was with the consent and sanction of the corporation, and it was virtually conceded if anything to the contrary appeared it would be fatal to the application.

IV. The contract of lease is incomplete—something must be done before it is perfect—and so long as that is the case a mandamus will not lie to complete or execute it, or pay out moneys under the terms of it. The proposition of law here stated was conceded on the argument, and the authorities to sustain it are abundant. It has been repeatedly held that contracts of this kind are inchoate, and that a mandamus would not issue to compel an officer to execute them (*People v. Canal Board*, 13 *Barb.*, 432, in which Mr. Justice Cady cites and reviews a large number of cases).

V. If the contract be complete and not inchoate and incomplete, the relator does not need the aid of a writ of mandamus, for he has his action at law for the rent of the premises. 1. If there be any other remedy a mandamus will not be granted (2 *Cow.*, 444; 18 *Wend.*, 575; 12 *Johns.*, 414; 1 *Cow.*, 423; 21 *Wend.*, 25; 6 *Hill*, 243, 244; 2 *Hill*, 45; 1 *Wend.*, 318; 5 *Hill*, 616, 629). 2. If the contract be inchoate and not complete and perfect, a mandamus will not lie to compel an officer to complete it. See cases above cited, and also 3 *Cal. R.*, 167; 1 *Olarke (Iowa)*, 179; 11 *How. (U. S.)*, 272. 3. If there be a perfect and complete contract of lease, an action will lie for the rent, and there is no reason why a mandamus should not issue at the suit of any other person against any other corporation or person for the payment of any other claim, as well as for the payment of this claim for rent of the premises in question.

VI. The statute provides as follows: "All moneys drawn from the city treasury shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor, and approved by the comptroller and filed in his office." (Act of 1857, § 22.) There is no pretense that any voucher for the expenditure now sought to be obtained by peremptory manda-

People *ex rel.* Wood v. Connolly.

mus has ever been examined or allowed by the auditor, nor that any such voucher has been approved by the comptroller or filed in his office. The warrant now demanded cannot be drawn without clearly contravening the provisions of this statute. It may here be observed that, if any doubt could exist as to the drawing of a warrant by the comptroller being an act upon which he has a discretion to be exercised, it would be put to test by this provision of the statute; for the words "approved by the comptroller" clearly recognize his discretionary powers in the matter. It will not be contended by the counsel for the relator that an act concerning which the officer has a discretion can be compelled by mandamus. Again, the 15th section of the third chapter of the Revised Ordinances provides as follows: "But no such warrant shall be drawn unless the sum specified therein is embraced in an appropriation previously made for that purpose by the common council." Before the warrant now demanded can be drawn by the comptroller, the common council must have, by a vote of both of its branches appropriated the sum claimed to the purpose of the payment or the claim in question, or he will not only make himself personally liable for the amount so drawn, but incur the penalties of a misdemeanor for the act. The court may be here reminded that if the relator fails upon any one branch of his claim in the alternate writ, he must fail in all (*Hill*, 50, 55; 18 *How.*, 152). The reason of the rule is that the peremptory writ must follow the alternative writ, and it is not true, as was maintained at the argument, that the Code has obviated this objection, and allowed the party to strike out and amend, as in other cases. The Code nowhere alludes to a writ of mandamus. It has repeatedly been held that it does not in any of its provisions embrace, regulate or refer to proceedings of that character (16 *How.*, 4; 19 *Barb.*, 657; 7 *How.*, 124).

VII. Such portions of the writ as are not admitted by the return either expressly or tacitly, must be taken to be untrue, and for the purposes of this argument may be deemed to be stricken out. In the absence, then, of the allegations that may be deemed so stricken out, there is not enough upon the face of the writ to establish a claim to the peremptory writ aside even from all the affirmative matter set up in the return.

LEONARD J.—The relator appears, from the facts stated in the alternative writ, and the answer, to be entitled to have his lease executed by the defendant. An ordinance has been duly passed, directing its execution by the defendant, who is their subordinate officer and agent. The clerk who has the custody of the seal must use it when those who are authorized call for it. He cannot prevent the comptroller from carrying into effect an ordinance which necessarily required the impress of the seal. But there is an insurmountable objection to the writ, existing at present.

The comptroller is under an injunction from this court, at the suit of Pullman, an alderman at the time the suit was commenced, and authorized by law to maintain such an action in his own name—forbidding him to execute this lease, or to pay the rent. Pullman has now ceased to be an alderman, and the suit has, I think, abated from that cause. But abatement is but a temporary disability, and, if there is any successor, might be revived. It is doubtful whether, if there is any legal successor of an alderman, he would allow the suit to be revived in his name, but the suit and injunction cannot for that cause be denied an existence. The injunction must be removed before the motion can be granted. This court cannot require the defendant to violate an injunction. If the suit is legally defunct, it only requires an application to this court to remove that barrier to the relief sought. Due observance of the process of injunction compels this court to respect its provisions until it has been regularly terminated in its authority.

The application for the mandamus, as it respects the payment of the rent, depends on other principles.

It is not made to appear, as it must before the peremptory writ can be allowed, that there is money in the treasury belonging to the relator. Unless that fact clearly and affirmatively appear, he must take the customary remedy by action.

The application must be denied without prejudice to a renewal in case of the removal of these grounds of objection.

MASON *against* RING.*Court of Appeals; March Term, 1861.*ATTORNEY AND CLIENT.—UNDUE INFLUENCE.—JUDGMENT ON
REFEREE'S REPORT.

The rule that transactions between attorney and client, by which the former is benefitted, will be set aside upon an action brought for the purpose, unless clearly shown by the attorney to have been either just and fair, or purely voluntary on the part of his client, applies to every relation which pre-supposes an ascendant or controlling influence by one party on the mind of the other. (Per SELDEN, J.)

So long, therefore, as the influence exists, the rule applies, although the strict technical relation may have terminated.

A deed or instrument, given in such case, as a compensation for services rendered, will, however, be allowed to stand as security for what is actually due.

The negligence of the attorney, who is the creditor in such a case, in making his entries of charges against his client, and the loose state of his accounts, though these raise a presumption against his claim, are not conclusive.

The finding of the judge in the judgment entered upon the report of a referee to whom it has been referred to take an account, and adopted as the basis of the judgment, may be construed by the language of the report.

Appeal from a judgment.

This action was brought by James Mason against James J. Ring. Upon his death, Zebedee Ring was substituted as a defendant, both in his personal capacity as heir, and as the administrator of the estate of James J., deceased.

The object of the action was to set aside a conveyance of land which the plaintiff had previously made to the decedent, and which was intended as a compensation for the decedent's services and disbursements as attorney and counsel, and in other capacities as agent of the plaintiff, during a period of about thirteen years.

The plaintiff sued not only to have the conveyance, which transferred forty-five lots of land, set aside; but also to have the

Mason v. Ring.

accounting and settlement upon which it was based, opened, and the accounts between the parties taken anew.

On the trial, the plaintiff proved some errors in the accounts; and the court, after determining the principles upon which the accounting should be taken, ordered a reference to take and state the account. The referee reported that "there was due from the decedent to the plaintiff, in January, 1856, the sum of thirty-six thousand seven hundred and ninety-nine dollars and fifty-five cents, irrespective of, and without taking into consideration the sum of twelve thousand dollars due to the decedent for costs and counsel fees, &c., which said sum is still due and unpaid." Further, that he had "taken an account of all the costs, counsel fees, and other just charges of James J. Ring (the decedent) against the plaintiff, for professional services rendered on his account, and have inquired, as directed by said order, and do report, that twelve thousand dollars is a just and proper allowance and compensation for such services." And he further reported that, allowing the decedent credit for the said twelve thousand dollars, and charging him with the other sum, and computing interest on the balance, there was due from the decedent's estate to the plaintiff, twenty-nine thousand six hundred and forty-five dollars and eighty cents.

Upon the coming in of the report, the cause being brought on for hearing, the court confirmed the report, and ordered the conveyance to be set aside and declared void, and the possession of the land to be delivered up to the plaintiff, and that the plaintiff recover the amount reported due to him. Other provisions of the judgment it is not necessary to state.

The accounts taken before the referee contained a very large number of transactions in respect to the care of the plaintiff's property, and disbursements on various personal accounts, the expenses of managing his farm, of building, and many other matters.

From final judgment in superior court, setting aside the conveyance as above stated, the defendant appealed to the court of appeals.

Tracy, Powers & Tallmadge, for the appellants.

Henry A Cram, for the respondent.—I. Where dealings occur between parties who have stood in the *confidential* rela-

Mason v. Ring.

tion towards each other of principal and agent, trustee and *cestui que trust*, guardian and ward, attorney or solicitor and client, to prevent the application to such dealings of those principles of protection extended by the courts to the parties to the relations reposing confidence, it is necessary, not only that the relation, but the influence arising therefrom, should have ceased (*Wright v. Proud*, 13 *Ves.*, 138; *Lady Sanderson's Case*, cited in *Morse v. Proud*, 12 *Ves.*, 372; *Holman v. Laynes*, 18 *Jurist*, 839).

II. The confidential relation of attorney and client does not necessarily terminate on the termination of litigation conducted by the attorney. The existence of a litigation is in nowise necessary to the existence of the relation, nor does the relation necessarily terminate on the termination of a litigation which originated it (*Goddard v. Carlisle*, 9 *Price*, 169). Where an attorney has been the general agent and manager and adviser of the client, these propositions acquire additional force.

III. When an attorney holds in his hands moneys of his client unaccounted for, the relation still subsists (*Gibson v. Jeyes*, 6 *Ves.*, 266; *Hatch v. Hatch*, 9 *Ves.*, 292).

IV. Where the relation is shown to have existed, the relation and its influence will be presumed to continue during subsequent transactions, in the absence of any evidence to the contrary (*Carter v. Palmer*, 1 *Dru. & W.*, 722; *Lewis v. J. A.*, 4 *Ed. Ch.*, 599; *Austin v. Chambers*, 6 *Cl. & F.*, 1; *Goddard v. Carlisle*, 9 *Price*, 169).

V. Throwing out of view the still more rigid rule as to gifts for services, hereafter referred to, the court must apply to all such dealings as those between attorney and client in that case, the rule recognized and reiterated in all the English and American cases, and repeated by Lord-Chancellor CRANWORTH in one of the latest English cases in the House of Lords (*Savery v. King*, 35 *L. & Eq.*, 101), in the following language: "Where
"a solicitor purchases or obtains a benefit from his client, a
"court of equity expects him to be able to show that he has
"taken no advantage of his professional position; that the client
"was so dealing with him as to be free from the influence
"which a solicitor must necessarily possess, and that the solicitor
"has done as much to protect his client's interest as he would
"have done when dealing on his behalf with a stranger." If

Mason v. Ring.

the professional man fails to show this by affirmative proof, the transaction cannot stand—it is presumptively unfair and void. The fact being found that a dealing beneficial to an attorney has taken place, during the continuance of the influence of the relation, the conclusion of law is, that the dealing is void, unless the additional affirmative fact is also found that the client was emancipated, and they dealt at arm's length, and the attorney had done as much to protect his client's interest, as he would have done when dealing on his behalf with a stranger (*Thompson v. Judge*, 3 *Drew.*, 306; *Gibson v. Jeyes*, 6 *Ves.*, 266; *Holman v. Loynes*, 18 *Jurist*, 839; Judge HOFFMAN, in *Howell v. Ranson*, 1 *N. Y. Leg. Obs.*, 10; *Howell v. Ransom*, 11 *Paige*, 538; *Berrien v. McLane*, 1 *Hoffm.*, 421; *Evan v. Ellis*, 5 *Denio*, 640; 2 *Sch. & L.*, 493; *Edwards v. Meyrick*, 2 *Hare Ch.*, 61).

VI. In the case of gifts, a more rigid rule applies. They are absolutely void if made while the connection of attorney and client, or the influence created by or springing from it, subsists. And by gifts are here embraced, not only pure gifts, but also all transfers in consideration of services (*Walmsby v. Booth*, 2 *Atk.*, 27; *Sanderson v. Glass*, 2 *Id.*, 225; *Strachan v. Brandon*, 1 *Eden*, 303; *Welles v. Middleton*, 1 *Cox Cases*; S. C. in House of Lords, 4 *Brown's Cases*, 245; *Hatch v. Hatch*, 9 *Ves.*, 292; *Newman v. Payne*, 2 *Ves.*, 198; *Purcell v. McNamara*, 14 *Ves.*, 91; *Huguenen v. Baseley*, 14 *Ves.*, 273; *Hylton v. Hylton*, 9 *Ves.*, 547; *Wood v. Downes*, 18 *Ves.*, 120; *Holman v. Loynes*, 18 *Jurist*, 839; *Thompson v. Judge*, 3 *Drew.*, 306; *Kenny v. Brown*, 3 *Ridgway, Parliamentary Cases*, 462; *Berrien v. McLean*, 1 *Hoffm.*, 421).

VII. A gift or purchase of the subject-matter of the litigation during the relationship, is doubly void (Lord THURLOW in *Hale v. Hallet*, 1 *Cox Cases*, 134; *Wood v. Downes*, 18 *Ves.*, 120; *Berrien v. McLean*, 1 *Hoffm.*, 421).

VIII. The foregoing doctrines of the English courts have been adopted by our courts. If they have been modified at all by the Code, it is only in a point immaterial to this case, viz: in permitting contracts made before, or in the creation of the professional relation, that before would have been illegal; such as contracts for compensation out of the subject-matter of litigation: even this has been denied by the courts (*Barry v. Whit-*

Mason v. Ring.

ney, 3 *Sand. Sup. Ct.*, 696; *Starr v. Vanderheyden*, 9 *Johns.*, 253; *Matter of Bleakley*, 5 *Paige*, 311; *Evans v. Ellis*, 5 *Denio*, 640; affirming *Ellis v. Messervie*, 11 *Paige*, 467; *Merritt v. Lambert*, 10 *Paige*, 352; S. C. affirmed in court of errors under name of *Wallis v. Lambert*, 2 *Denio*, 607; *Howell v. Ranson*, 11 *Paige*, 538; S. C. before HOFFMAN, J., 1 *Leg. Obs.*, 10; *Ford v. Harrington*, 16 *N. Y.*, 285). The same doctrines are maintained in the civil law. See Pothier (*Traite des Donations entre vifs*, § 1).

IX. The facts established by the evidence in this case show the existence of the confidential relation in full force up to the time of these transactions.

X. A case of gross mistake and error, amounting to fraud, was made out, and the plaintiff was entitled to have the whole account opened and taken *de novo* (1 *Story Eq. Jurisp.*, §§ 523, 527; *Mathews v. Wolwyn*, 4 *Ves.*, 125; *Newman v. Payne*, 2 *Ves. Jr.*, 189; *Beaumont v. Roultee*, 5 *Ves.*, 485; *Story Eq. Pl.*, § 800; *Barrow v. Rhinelander*, 1 *Johns. Ch.*, 550; *Blaygrave v. Routh*, 2 *Kay & J.*, 522; *Purcell v. McNamara*, 14 *Ves.*, 91; *Lady Ormand v. Hutchinson*, 13 *Ves.*, 47; *Lewis v. Morgan*, 5 *Price*, 42; *Jenkins v. Gould*, 3 *Russ Ch.*, 385; *Coleman v. Millersh*, 2 *McN. & G. Ch.*, 309).

XI. The judge was right in setting aside the deed of the forty-five lots; because, 1st. It was made under the influence of the professional relation, and, therefore, as a gift, absolutely void. 2. Because applying to it only the general presumption and rule the courts apply to all dealings between attorney and client, beneficial to the attorney, viz: that they are fraudulent and void, unless the attorney, by affirmative proof, shows their fairness, and that no advantage has been taken, they cannot be sustained; because, (a) No such affirmative proof has been given. (b) It conveyed property for services—the value of the property being four-fold the value of the services. (c) No account of these services had been rendered. (d) The attorney, at the time of the gift, by his accounts, falsely represented to the client that he was indebted to the client, on their money transactions, in the sum of one thousand two hundred and fifty-eight dollars and forty-nine cents, when, in truth, he owed the client thirty-six thousand seven hundred and ninety-nine dollars and fifty-five cents. (e) The attorney had never ren-

dered any account of his money transactions (see remarks of Lord ELDON, in *Montesquieu v. Sandy*, 18 *Ves.*, 302). (*f*) That the settlement and the deed of the forty-five lots, being of the same date, are to be considered as one transaction, and when the settlement is aside, it carries with it the deed. (*g*) The consideration of the deed of the forty-five lots was the invalid gifts and wills made *pendente lite*.

SELDEN, J.—It is not sought by this appeal to disturb the finding of the judge at special term, in respect to the state of accounts between the plaintiff and the defendant's intestate, so far as those accounts have been properly investigated. What is claimed on the part of the appellants is :

First. That the deed of the forty-five lots was, in all respects and to all intents, just, fair, and legal, and should have been adjudged to be valid.

Second. That if it be considered that the relations between the parties were such as to affect the validity of the deed, it was, nevertheless, erroneous to set it aside absolutely, without compensation to the intestate for his services as agent and general manager of the estate of the plaintiff for many years, and without any inquiry as to the value of those services.

The superior court, notwithstanding the premises conveyed by the deed in question constituted part of the subject-matter of the suits which the intestate had conducted, did not proceed, in setting aside the deed, in any degree upon the law of champerty or maintenance, but upon the general rule that transactions between attorney and client, by which the former is benefitted, will be set aside, unless clearly shown by the attorney to have been either just and fair, or purely voluntary on the part of the client.

It is insisted by the appellant's counsel that this rule does not apply, as the relation of attorney and client had ceased long before the giving of the deed ; the last of the suits in which the intestate was engaged having finally terminated in April, 1855, while the deed was not executed until January, 1856. The rule, however, is not so limited as the counsel seem to suppose. It applies to every relation which presupposes an ascendant or controlling influence by one party on the mind of the other ; such, for instance, as that of guardian and ward ; trustees and

Mason v. Ring.

cestui qui trust, &c. The foundation of the rule is the influence arising from the relation. So long, therefore, as the influence exists, the rule of course applies.

It is apparent that in many cases the influence acquired during the existence of the relation may extend more or less after the period of its termination. The authorities show that when this is the case, the transaction will be scrutinized with the same jealousy as if the relation had continued. In the language of Lord ELDON, in *Wood v. Downes* (18 Ves., 119): "It is not denied in any case that if the relation had completely ceased—if the influence can be rationally supposed also to cease—a client may be generous to his attorney or counsel as to any other person, but it must go so far."

It was found by the judge before whom the case was tried, that the deed "was executed under the influence of the confidential relations, and of the relation of attorney and client, theretofore subsisting between the said plaintiff and the said James R. Ring."

Under this finding, the position of the case is precisely the same as if the deed had been given before the litigation was ended. It was not executed as a gift, but, as the judge has found, as a compensation for professional and other services previously rendered. In such cases the courts will not set aside a transaction, if it appears clearly to have been in all respects just and fair, or if the action of the client seems to have been entirely voluntary, that is, without any disturbing influence growing out of the relation. But such an influence is uniformly suspected. It is not necessary for the client to establish it by proof *aliunde*. The presumption is in his favor, since it was not essential, in order to justify the court in setting aside the deed, that the judge should find, as an affirmative fact, that it was obtained by fraud or undue influence. The law presumes such influence from the relation which is found substantially to have existed between the parties. This presumption would, no doubt, be repelled in a case where the court could see, from the character and conduct of the parties, that there was no reason to impute to the attorney any undue ascendancy over the mind of his client. But that can hardly be said in the present case. The action of the court, therefore, in setting aside the deed, after having found as a fact that it was executed under the in-

Mason v. Ring.

fluence of the previous relation, was in accordance with the principles which have been generally applied to such transactions.

It does not follow, however, that the judgment is to be, in all respects, affirmed. Upon general principles of equity, a deed or instrument of any sort given, in such a case, as a compensation for services rendered, will be allowed to stand as security for what is actually due.

It is contended, on the part of the appellants, that the intestate was entitled to a compensation for his services as the general managing agent of the plaintiff for a long period, and that no allowance whatever is made by the judgment of the superior court for those services.

The judge has found that, from the year 1844 to the year 1856, the intestate took charge of all the affairs and property of the said plaintiff, paid his bills, managed his property, and supplied him with money from time to time. Of course, thus considering the circumstances and the risk incurred, the intestate was entitled to a compensation, and even a liberal compensation for services of so general and handsome a nature. It is said that he was negligent in making his entries, and that the account of his receipts and expenditures were left in a loose and disorderly manner. This was, no doubt, highly censurable, and should subject him to unfavorable presumptions and influences in taking the account. But could this inattention to details cancel the obligations of the plaintiff to reward him for years of devotion to the plaintiff's interests, and for the personal sacrifice made at a time when the plaintiff's means of remuneration were entirely uncertain? I think not. No actual fraud is imputed to the intestate by the finding of the judge; and it is expressly found, that he is charged in the accounts with the amounts and sums received by him "from all sources" on account of the plaintiff. I can see, therefore, no just principle upon which he or his representatives can be denied all compensation for his services. If, then, it should clearly appear, upon an examination of the case, that the only allowance made to the intestate was for his professional services as attorney and counsel, and that nothing has been allowed for his onerous and continued services as agent and manager of the plaintiff's affairs, the judgment should be opened in order that a proper provision in that respect may be made.

Mason v. Ring.

It is said by the respondent's counsel that the allowance of twelve thousand dollars made by the supreme court, was intended not merely as a compensation for the costs, counsel fees, and professional services of the intestate, but for all other services and charges whatsoever.

If we look at the finding of the judge below, this may be a just inference from the language used. That language is, "that twelve thousand dollars is a just and proper allowance and compensation for the said services of the said James J. Ring, hereinbefore mentioned, and for all costs, counsel fees, and other just charges that he was entitled to," &c. This language is comprehensive enough to include the services of Mr. Ring as agent; but rightly to interpret it, it became necessary to look into the previous history of the case.

This sum of twelve thousand dollars was taken from the report of the referee, appointed to take and state an account between the parties. By the order of the reference, the referee was directed to "take an account of all costs, counsel fees, and other just charges of the said James J. Ring against the plaintiff, for professional services rendered on his account; and to inquire and report what sum would be a just and proper allowance and compensation for such services." The order is entirely silent as to any compensation for services, as agent or general manager for the plaintiff.

The inquiry is strictly limited to charges for professional services.

The language of the referee's report is equally definite; he says, he has taken an account of "all the costs, counsel fees, and other just charges of James J. Ring against the said plaintiff, for professional services rendered on his account; and that \$12,000 is a just and proper allowance and compensation for such service."

There can be no pretence, therefore, that anything was actually included in this sum of \$12,000 as a compensation for services, other than professional.

This report was confirmed; of course, then, the inference is, when the judge adopts this sum of \$12,000, that he does not arrive at it from any original investigation of his own, but takes it from the report of the referee, especially as the finding of the judge is in the precise language of the order of

Mason v. Ring.

reference, and of the report, as far as it goes. It omits, it is true, the phrase "for professional services." Now, whether this omission was accidental, as I should be led to infer, or was intentional, the result must be the same.

As the referee expressly found that the \$12,000 was a just compensation for professional services alone, and as this report was confirmed, it is clear that no allowance has in fact been made for any other services.

If, then, the omission to direct any inquiry on the subject of services, other than professional, or to provide a compensation for such services, in the final judgment, occurred through inadvertence, it should of course be corrected. But if, on the other hand, the judge came to the conclusion that the intestate was not entitled to compensation for such services, and therefore omitted to make any provision on the subject, this, in my judgment, was clearly erroneous. No such conclusion could legitimately follow from the facts found by him.

For twelve years the intestate not only took the entire charge of the defendant's affairs, even to the most minute daily expenditures, but made very considerable advances from his own means for the support of the plaintiff and his family, at a period too, when it was entirely uncertain whether the plaintiff would ever be able to reimburse him.

The intestate has been deprived by the judgment of the court of all extra compensations, through the sense of justice, or the generosity of the plaintiff; and there seems to be no just reason why he or his representatives should not receive a reasonable allowance for his twelve years' service.

The judgment of the superior court should be opened, and the proceedings should be remitted, in order that inquiry may be made as to the services of the intestate, other than professional; and the deed should be permitted to stand, until the inquiry is made, and the accounts are finally adjusted, with costs, subject to the award of the court, upon the final determination of the case.

JAMES, J.—The judgment below was based on the sole ground that the deed, settlement and release were made, executed and delivered by the plaintiff, under the influence of the confidential relations existing between the parties, arising

Mason v. Ring.

from their former relations of attorney and client. Such is the fair interpretation of the language in the finding of the judge at special term. The word "theretofore" in the finding can only have force by such construction: and this interpretation is sanctioned by the fact that the actual relation of attorney and client had ceased some nine months previous the execution of the deed.

It is a rule of equity that while the relations of attorney and client subsist in their full vigor, the latter shall not derive any benefit to himself from the contracts or bounty or other negotiations of the former (*Wood v. Downs*, 18 *Vesey*, 126), and this doctrine is not limited to the rights or property in controversy, but may extend to the other contracts and transactions disconnected therefrom, when from the attendant circumstances there is reason to presume that the attorney possessed some marked influence, ascendancy or other advantage over his client in respect to them (*Edwards v. Meyrick*, 2 *Hare*, 60-68). It is not necessary in such case to establish that there has been fraud or imposition on the client, nor on the other hand is the transaction necessarily void, *ipso facto*; but the burden of establishing its fairness is thrown upon the attorney. The reason of the rule is that the relation gives rise to great confidence between the parties, enables the attorney to exercise a strong influence over the actions of his client, puts it in his power to avail himself of his necessities, his good nature, liberality and credulity; and hence the law not only watches over all the transactions of parties in this predicament, but often interposes to declare void transactions which, between other parties would be held unobjectionable. But where the relation of attorney and client is completely dissolved, and the parties no longer under the antecedent influence, this rule ceases, and they stand upon the rights and duties common to all other persons (*Gibson v. Jeyes*, 6 *Vesey*, 277). It was shown in this case that the relation of attorney and client had ceased, and the confidential relations arising therefrom were broken off and dissolved some time before the deed in question was executed and delivered, and therefore there is no ground upon which the foregoing equity rule can be applied in this case.

The plaintiff was of mature age, of sound mind, and sufficient capacity to fully understand and to appreciate all his rights;

Mason v. Ring.

and the voluntary execution and delivery of the deed in question, as a compensation for Ring's professional and other services, cannot, upon the facts established in this case, be attributed to the influence of the confidential relation theretofore existing between them, but rather to the performance of a previous agreement or understanding that Ring, if successful, should participate in a share of the profit of the litigation.

It was insisted that the foregoing equity rule had been abrogated by the Code, § 303; such, however, is not the effect of the statute. Its object and purpose were to place the lawyer upon the same footing as other persons, free to make his engagements with his clients as they should agree; and, although extremely broad in language, it went no farther. It removed the restraint imposed by the statute of champerty and maintenance, permits contracts for services to be made between attorney and client before or on the creation of the professional relation, and payable out of the subject matter of the litigation, or upon a division thereof, when recovered or otherwise, but in no wise affects the equity rule as to subsequent actions created or performed under the influence of that relation.

No appeal was taken from that part of the judgment, which fixed the intestate's indebtedness on the accounts at \$36,799.55, and from the finding of the referee that Ring's professional services were worth but \$12,000, and therefore we make no inquiry as to those matters.

The appeal was from that portion of the judgment which declared the deed of the forty-five lots void. For reasons herein given, we think that judgment erroneous, and should be reversed. The lots at the time of conveyance were valued at \$45,000, and that was the estimate which the plaintiff himself placed upon the professional and other services of said intestate. That Ring rendered services, other than professional, of great value to the plaintiff, was clearly shown, and those services were not included in the estimate of the referee. We therefore think it proper that the plaintiff's own estimate of Ring's services should stand, and that the judgment of the court below should be reversed as to the forty-five lots; said lots, however, to be made subject to the payment of the bal-

 Reilly's Case.

ance found due on the accounting, with interest, but without costs to either party in this court or the court below.

Judgment reversed, and the proceedings remitted for further accounting as to services other than professional.*

47:25 24 Nov.
28.149.

 RIELLY'S CASE.

New York Common Pleas ; Special Term, March, 1867.

HABEAS CORPUS.—JURISDICTION OF STATE COURTS.—CONFLICT OF LAWS.

Under the acts of Congress of February 13, 1862, and March 3, 1865, the oath of a soldier, on enlisting, that his age is above eighteen years, makes the enlistment binding and valid, and the officers of the government and the courts have no power to discharge, in such a case, upon the ground that the soldier was under age, and had enlisted without consent of parent or guardian.

Nor does it affect the validity of the enlistment in such a case, that the recruit was, at the time, an indentured apprentice.

A State court has not power, upon a *habeas corpus*, to inquire into the validity of an enlistment in the army of the United States. Since the validity of the enlistment depends upon the construction of the acts of Congress, the application should be to the judicial tribunals of the United States.

The case of *Abelman v. Booth*, 21 *How. (U. S.)*, 506, explained and followed.

Application for an attachment to enforce *habeas corpus*.

The facts are stated in the opinion of the judge.

DALY, F. J.—A writ of *habeas corpus*, directed to Major-General Butterfield, was granted by Judge BRADY, upon the application of John W. Flynn, to bring up the body of George Reilly, alleged to have been wrongfully enlisted in the regular army of the United States, he being, at the time of his enlist-

* The subsequent proceedings in the court below, upon the reference to ascertain the amount of such services, other than professional, for which the deed was allowed to stand as security, are reported in 10 *Bosw.*, 598.

Reilly's Case.

ment, a minor under the age of eighteen years, and an indentured apprentice of Flynn, the petitioner. General Butterfield returned to the writ that Reilly had been regularly enlisted in the service of the United States according to the rules and regulations of the service; that he signed the statement or declaration made by recruits; that the oath required upon enlistment was duly administered to him, and that he was regularly examined by a surgeon appointed for that purpose. General Butterfield further returned that under the decisions of the advocate-general it was not his (General Butterfield's) duty to produce the body of Reilly, and that his refusal and denial of the court's jurisdiction was a matter on his part of official duty, and not from any disrespect to, or contempt for, the authority of the court, and that he annexed to the return one of the triplicate enlistment papers. The facts set up in the return were not denied by Flynn, the petitioner, but he produced satisfactory evidence showing that Reilly had been legally bound to him as an apprentice, in the city of Philadelphia, on the 11th of July, 1865, to serve for the period of four years, and that he was in his service as an apprentice at the time of his enlistment; that he (Flynn) had never consented to the enlistment; that Reilly's parents were both dead when the indenture of apprenticeship was executed; that he was then nearly seventeen years old, and was, on the following December, at the time of his enlistment, under eighteen years of age. Upon these facts, the petitioner insisted that Reilly should be produced by General Butterfield in obedience to writ, and discharged, on the ground that his enlistment was illegal.

The facts set up by the petition constitute no ground for the discharge of Reilly. The organization of the army of the United States is one of the powers specifically conferred by the constitution upon Congress. It is in the power of Congress to declare who may be enlisted, and the regulations which have been established by the laws of the United States upon the subject are of controlling authority. So far as they relate to the enlistment of minors or apprentices they may be briefly stated.

The act of March 20, 1813, required the consent in writing of the parent, guardian or *master* to authorize the enlistment of minors under the age of twenty-one years. This provision was repealed by the act of December 10, 1814, which act con-

Reilly's Case.

tained a provision in respect to the enlistment of apprentices, to the effect that in the case of the enlistment of any person held to service as an apprentice, his master should receive a designated portion of the bounty-money, a provision which impliedly recognizes the validity of the enlistment of apprentices. This act provided generally for the enlistment of able-bodied men between the ages of eighteen and forty-eight. It declared that such enlistment shall be binding and absolute upon persons under the age of twenty-one, and allowed recruits under that age four days from the time of their enlistment to reconsider and withdraw it. By the act of September 28, 1850, it was made the duty of the secretary of war to order the discharge of any soldier who, at the time of his enlistment, was under the age of twenty-one, upon evidence being produced to the secretary that the enlistment was without the consent of the parents or guardian of the minor; but the act made no provision for the discharge of an apprentice enlisted without the consent of his master. After the passage of this act, it was repeatedly held by the judges of this court that an officer, upon *habeas corpus*, had no authority to discharge a minor from an enlistment. That the act of Congress had provided a mode in which minors could be discharged, and that the only remedy in such cases was by an application to the secretary of war (In the Matter of Follis, *June*, 1862).

The act of the 13th of February, 1862, repealed the provision in the act of 1850, authorizing the secretary of war to discharge minors. It declared that no person should be mustered into the service of the United States under the age of eighteen years, and that the oath of enlistment taken by the recruit should be conclusive as to his age. And the act of March 3, 1865, declared that any officer should be dishonorably cashiered who should muster into the military or naval service any minor between the ages of sixteen or eighteen, without the consent of his parents or guardian, or any minor under the age of sixteen, knowing him to be such; and subjected any recruiting agent, substitute broker or other person, to fine and imprisonment who should, for pay or profit, cause any minor, without such consent, to be enlisted between the said ages, or under sixteen years of age, knowing him to be such. It is to be collected, as the result of this legislation, that minors can-

Reilly's Case.

not be enlisted under the age of sixteen; that they may be enlisted between the ages of sixteen and eighteen with the consent of their parents or guardians, and after eighteen without such consent; that the oath which is taken by the recruit at the time of his enlistment is conclusive as to his age, and that apprentices may be enlisted.

I have not the triplicate enlistment papers of Reilly now before me. They are referred to as annexed to the return, and were probably produced upon the hearing. If it appears by them that Reilly at the time of his enlistment swore that he was eighteen years of age or upwards, the petitioner is precluded from questioning it, as the statute declares that that oath shall be conclusive; by which I understand that it shall be sufficient to make the enlistment binding and valid. The severe penalties imposed as a means to prevent the improper enlistment of minors; the taking away from the secretary of war the authority to discharge them, and the effect given to their own oath as to their age, show that this was all the regulation that Congress deemed necessary for the protection of minors, and that if they swore at the time of their enlistment that they were eighteen years of age or upwards, the enlistment should be binding, and that it should not be in the power thereafter of the officers of the government or of the courts to discharge them upon the ground that they were under that age, and had enlisted without the consent of their parents or guardians. Nor does it affect the validity of the enlistment that the recruit was at the time an indentured apprentice. It is in the power of Congress to say who shall serve in the army. It has made no reservation in the case of apprentices, but on the contrary, by providing for the division of the bounty between the master and the apprentice, it has indicated that this class of persons may be enlisted.

But if there should be any doubt of the correctness of this view of the law, there is another and conclusive answer to this application, which is, that Reilly is held to service as a soldier in the regular army by an officer deriving his authority from the government of the United States, and as the question presented, his right to be discharged from the army is one in which the general government is interested, and as the validity of his enlistment depends upon the construction to be put upon

Reilly's Case.

the laws of the United States, the application should be to the judicial tribunals of the United States, and not to the courts or judicial officers of the States. The privilege of the writ of *habeas corpus* is secured to every citizen by the constitution of the United States, and the due protection of the liberty of the citizen demands that the judicial officers of the States should grant it whenever complaint is made to them that a person is illegally imprisoned or restrained in his liberty; but when it is shown in answer to the writ that the person is held to service in the army by an officer acting under the authority of the United States, and claiming to hold him as an enlisted soldier, the writ, so far as the State government is concerned, has fulfilled its office, and the inquiry whether he is an enlisted soldier, or whether he could be lawfully enlisted, is one especially appropriate to, and in my judgment exclusively belonging to, the judicial tribunals of the United States. The judicial powers of those tribunals, by the constitution, extend to all cases arising under the laws of the United States, and to all controversies to which the United States is a party, and they have authority to grant the writ of *habeas corpus*, and to give in such cases any relief which it would be in the power of the State tribunals to afford. Chancellor KENT said, half a century ago, upon an application to the supreme court of this State for the release upon *habeas corpus* of a minor who had enlisted in the army under the age of seventeen without the consent of his father, "The federal courts have complete and perfect jurisdiction in the case, and there is no need of the jurisdiction or interference of the State courts, nor does it appear to me to be fit that the State courts should be inquiring into the abuse of the exercise of the authority of the general government;" and the four other judges of the court united with him in refusing the application, upon the ground that relief could be afforded by the judicial officers of the United States, whose jurisdiction they held to be unquestionable (In the Matter of Ferguson, 9 Johns., 239).

The propriety of this course is obvious. By leaving the determination of such cases to the national tribunals, the advantage is ultimately secured of a uniform course of decision and of procedure, instead of the conflict of opinion and of practice, which is the inevitable result of allowing every

Reilly's Case.

judicial officer in a State to hear and determine such applications according to his own view of the law. The supreme court of this State afterward, however, departed from this course, following two decisions in Massachusetts (*The Commonwealth v. Cushing*, 11 *Mass.*, 67; *Same v. Harrison*, *Id.*, 63). The opinion of the court was asked by the recorder of this city, and they directed him to discharge a minor who had been enlisted without the consent of his guardian. In the *Matter of Carlton* (7 *Cow.*, 471), the court, in a very brief opinion, and without giving any consideration to the weighty reasons adduced by Chancellor KENT in the previous case, declared that the courts of this State had the right, in the exercise of their common law jurisdiction, to discharge any person illegally detained, and that if an enlistment was void by act of Congress, the courts or judicial officers of this State might discharge the person detained, there being nothing in the laws of the United States restricting them from the exercise of this power. Under this decision the judicial officers of the State exercised for many years jurisdiction in all such cases, which was practically attended with this injurious consequence to the interests of the United States; that the applications were usually heard *ex parte*; that they were very numerous, which was especially the case in this city, and particularly before the judges of this court; that judges differed in their construction of the act of Congress—some discharging where others would not, of which the case of aliens was a familiar illustration (See in the *Matter of Ross*, 1 *Leg. Obs.*, 340; *United States v. Wyngate*, 5 *Hill*, 16), and where the judge decided erroneously, it was rarely possible to secure the United States against the effect of it, by a review of the decision, as the soldier was instantly discharged, and the general government lost not only his services, but in addition the bounty that had been paid to him and the expense incurred in his equipment and maintenance.

The decision of the supreme court of the United States in *Abelman v. Booth* (21 *How. U. S.*, 506), has put an end to the claim of the courts or judicial officers of the States to entertain jurisdiction of, and to set at liberty persons who are in the custody of or held under the control of officers acting under authority of the government of the United States. The decision holds, in substance, that there is within the territorial

Reilly's Case.

limits of every State two sovereignties—the government of the United States and the government of the State; that when a State judge or court is judicially apprized that the person claiming to be discharged is in custody under the authority of the United States, they can proceed no further; that they then know that he is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any process issued under State authority can pass over the line of division of the two sovereignties. He is within the dominion and exclusive jurisdiction of the United States, and if he is wrongfully restrained of his liberty, their judicial tribunals can afford him ample redress. This decision was rendered in a case where a State court claimed the right to discharge upon *habeas corpus* a prisoner in custody of the marshal, under a warrant of commitment from a United States commissioner, and it is argued upon this application that the decision applies only where a person is in custody upon the process of a United States court or judicial officer. The ground upon which the decision of the court was put by Chief-Justice TANEY, with the concurrence, it would appear, of all his associates, is as applicable to the case of a person held to service in the army, and is under the control of a military officer, as to one in custody under legal process. It was held to apply to the cases of *Morris v. Newton* (5 *McLean U. S. Circ. Ct.*, 92); in the *Matter of Jordan* (2 *Am. L. Reg. N. S.*, 749); in the *Matter of Hobson* (40 *Barb.*, 34); *State of New Jersey v. Zulich* (5 *Dutch*, 409), which were all cases of persons held to service in the army of the United States, and in the conclusion arrived at by the judges in each of these cases I fully concur.

The application must therefore be denied.

KEENE *against* CLARK.

New York Superior Court ; General Term, February, 1867.

OBJECTION TO EVIDENCE.—CERTIFICATE OF RECORD.—FORMER
ADJUDICATION.

An objection to the reception of documentary evidence, certified by the clerk, on the ground that it is not duly certified, must state in what respect the alleged defect consists. A general objection is not sufficient to warrant the exclusion of the evidence.

Of the admissibility of the record of a decree as a former adjudication in a peculiar case.

Appeal from a judgment.

This action was brought by Laura Keene against John S. Clark and another, to recover damages for the alleged unauthorized performance, under direction of the defendants, of the drama "Our American Cousin," and to obtain an injunction restraining the continuance of the infringement.

The complaint, after alleging the plaintiff's title to the drama, and the infringement by the defendants, stated that she commenced an action in the circuit court of the United States for the eastern district of Pennsylvania, against the defendant, and that, upon a final hearing, the court rendered a decree establishing her right, and ordering an assessment of the damages incurred. She further alleged that since such judgment the defendants had represented the drama in the city of New York, without her consent.

The answer denied her title, and denied the rendering of such a decree as averred ; and alleged that what the defendants had paid to the plaintiff upon the litigation in the circuit court, was paid by way of compromise for the future representation of the drama.

On the trial of the issues in this action, the plaintiff offered in evidence a copy of the proceedings in the action in the circuit court referred to.

The defendants raised a general objection to the admission of

Keene v. Clark.

this certified copy, upon the ground that the same was not properly certified; without, however, specifying the objection more precisely. The evidence was excluded, and an exception taken.

The court dismissed the complaint; and from the order so made the present appeal was taken.

William D. Booth, for the appellant.

Edwin James, for the respondent.

ROBERTSON, Ch. J.—The only question before us seems to be whether the certified copy of the pleadings, proceedings and enrolled decree in the former suit in equity in the circuit court of the United States, between the present plaintiff as complainant, and the present defendant and a Mr. Wheatley as defendants, was admissible in evidence on the trial of the issues in this action. Such certified copy was twice offered; first generally, and a second time to prove that the matters in issue in this action were adjudicated in such former suit by said court, and prevent any contest of the same matter in this action. The only ground of objection to them stated was, generally, that they were “not properly certified,” without pointing out any defect in the certificate; and an exception was duly taken to their exclusion.

The counsel for the plaintiff now desires us in disposing of the appeal to abstain from expressing any opinion upon the question of the relevancy of such proceedings in the suit in the United States court to any matter in this action. The counsel for the defendants is only willing that we should do so if the court is of the opinion that such document was not properly authenticated, and will therefore refuse a new trial. One of the printed points made by him is, that the decree in such suit was not an estoppel or an adjudication of the same matter, for which several reasons are assigned and authorities cited. The question before us, and no other, is, whether a new trial should be granted for the exclusion of legal evidence. If we refuse a new trial there is nothing to prevent the defendant from taking the ground in an appellate court, that even if the certificate was proper the evidence was not admissible. If the defendant had stipulated that if the certificate were correct he would waive all

Keene v. Clark.

objections to the admissibility of the evidence, it would have taken away from the objection to the certificate the character of a mere mooted question, whose decision would have no practical result in this action, unless adverse to the plaintiff, which it must bear if the proceedings themselves, if duly certified, were inadmissible, and an objection could be taken on that ground on a new trial. The case being before us without such a stipulation, the question may as well now be disposed of, if necessary to dispose of the question of a new trial, as upon such trial, whether the proceedings in question do not create an estoppel or furnish evidence will be material to the issues. As to the exclusion of the document in question, upon the objection of a defective certificate,—even conceding what may not be well founded, that the certificate of the clerk as an authentication derives all its force from a statute of this State which requires a clerk of a United States circuit or district court to certify that he has compared the copy of the record or proceedings certified, with the original, and that the same was a correct transcript of the whole, in order to make such copy evidence (*N. Y. Sess. L.*, 1845, p. 326, ch. 303, 4th ed., stat. ch. 303, p. 641),—I do not think the objection was taken in such a form as to justify the exclusion upon the ground now suggested, to wit: That the clerk did not state that he had made the comparison required by the statute. It was held, nearly thirty years ago, in the case of *Norman v. Wells* (17 *Wend.*, 136), that a general objection to the sufficiency of proof of a deed was not available. The particular objection must be pointed out. An objection that a certificate was not duly authenticated, does not present the question whether it contained the necessary facts (*Waterville Manufacturing Company v. Brown*, 9 *How.*, 27). A general objection to receiving an instrument in evidence will not render an objection to the form of a certificate authenticating it available on appeal (*Mabbett v. White*, 12 *N. Y.* [2 *Kern.*], 442). By omitting to state why a note could not be read in evidence under a declaration, in an objection in that general form, the latter becomes unavailing (*Cayuga County Bank v. Warden*, 6 *N. Y.* [2 *Seld.*], 19, 30). The objection taken in the present case was of the most general kind, that the document was not properly certified. This, of course, gave the plaintiff no information how he could repair the defect aimed at. That

Keene v. Clark.

now suggested is of a very technical kind. The clerk by certifying under his oath of office, that the paper produced was a copy, is to be presumed to have taken the proper mode of ascertaining that it was so, and although such defect may be fatal if pointed out on the trial, the plaintiff was entitled to repair the defect on the spot by calling witnesses to prove the paper to be a copy. I think the papers offered were therefore improperly excluded under such an objection.

The more difficult question remains as to whether such documents were admissible as evidence of a prior adjudication, upon any of the matters involved in this action. This can only be determined by investigating the issues raised by the pleadings, the object of the action, the nature of the former, and the express adjudication made in the suit in equity in question. The complainant in that suit, in her bill of complaint, claimed, as she does in this, that she was the owner or literary proprietor of the drama in question, by purchase from the original author (Taylor) the manuscript of which, partly in the handwriting of such author, has been delivered to her, which drama never was printed, published or copyrighted by any one for the benefit of the author; that she had deposited in due form of law to obtain a copyright therefor the title of such drama in the office of the clerk of the district court of the United States for the southern district of New York, and that she had caused such drama to be publicly represented in the city of New York, deriving much profit therefrom; that one of the defendants (Clark) has obtained from another, who had performed one of the characters in such drama, under her employment, the principal parts thereof and their language; and both were then engaged in representing such drama for their own benefit in a theatre in Philadelphia. The defendants, in their answer, set up as a defense a license from a Mrs. Chapman, the widow and residuary legatee of an alleged author of such drama (Silsbee) jointly with the person named in the bill as such author (Taylor) who (it was alleged therein) derived the entire title to such drama, by an assignment from Taylor of his interest therein to a Mr. Webster, and the subsequent release by the latter of his interest therein to such joint author, who bequeathed all his personal property to his widow. They also set up the alienage of the original alleged author (Taylor), and of the complainant; took

issue on the facts alleged in her bill of complaint; and averred that the drama performed by them, instead of being identical with that performed at her theatre in New York, had been altered and improved by them therefrom, and only as so altered and improved was performed at their theatre. Proofs appear by the proceedings to have been taken in the suit, although they form no part of the record presented.

The conclusions to which the court in question came, and which may be considered as its adjudication of the rights of the parties, and of the points in issue in the suit, are to be found in the decretal order of November, 1860, directing a reference to a master to compute the value of a license from the complainant in that suit and present plaintiff, to the defendants to perform such drama at their theatre. Such order recited substantially that the court was of opinion that complainant had no copyright or statutory right of exclusive dramatic representation thereof, because she derived her literary proprietorship thereof from a non-resident alien author. That the theatrical representation of such drama by the defendants, unauthorized by the complainant, was such an infraction of her rights as entitled her to relief independently of any statute, because such drama had never been presented or published otherwise than by theatrical representation, and such defendants were not fairly enabled to represent it, by means of the complainant's own representation of it. And such court being also of opinion that the proper pecuniary compensation to the complainant was the value of a manuscript copy of such drama, and a license to the defendants to perform such drama without limitation at their theatre, directed a reference to a master to ascertain such value; such master subsequently reported the value of such copy and license to be a certain sum, five hundred dollars, upon which the final decree was made adjudging that the complainant recover the amount with her costs. It is not easy to discover by barely comparing the pleadings with the decision contained in the decretal order, to ascertain either what was passed upon thereby beyond the absence of any right of the complainant to a copyright or what adjudication was made therein. It would appear thereby that the court adopted the following resolutions, to wit: *First*, That the right of the complainant to the

Keene v. Clark.

exclusive representation of such drama was paramount to the right of the defendants thereto. *Secondly*, That as matter of law any publication of such drama by the complainant, by its theatrical representation, could only authorize a representation of it by others when a knowledge of its contents necessary therefor was derived from such representation by the complainant; and *Lastly*, That as matter of fact, such a knowledge of its contents as enabled the defendants so to perform it was not derived from the complainant's representation, but by means not sanctioned by the complainant. This is fully borne out by an examination of the able and elaborate opinion of the learned presiding judge, and what appears to be a summary of its conclusions preceding it as a head-note. Such conclusions were substantially as follows:

1. That the complainant became the owner or literary proprietor of the original drama by purchase from the author (Taylor).

2. That it was performed at the complainant's theatre as altered according to suggestions made by a performer at such theatre, while in her employment, to benefit such performance.

3. That the defendants became possessed of a copy of such drama through the medium of the residuary legatee of a performer at a theatre in London, whose manager had been temporarily proprietor of such original manuscript, but that, as matter of law, such possession did not entitle any one to perform the drama without the consent of the original author or his assigns; and there was no proof of such consent in the case.

4. That the changes made in the original by the complainant's employee before mentioned became accessions to the original, and as such their proprietorship remained with the complainant.

5. That the communication of them by such performer to the defendants, without her authority, did not entitle them to perform the drama in question with such alterations.

6. That although the defendants and their principal actress in such drama had been present at its performance at the complainant's theatre, they were not able to represent it from their mere memory, or that of any of the audience, of its words.

7. That the mode of performing such drama at the theatre of the defendants established, by minute circumstances, that it

was a close imitation of the mode in which it was represented at the complainant's.

8. That as matter of law the transfer from the original author of the use of the original manuscript for this country to the complainant, would enable her to maintain her action in a court of equity, and that she had the same remedy to prevent the use by the defendants of knowledge obtained from one of her employees, if acquired by him while in a confidential position in her employment, and known to them to be so acquired as by such employee himself.

9. That the changes made in the original drama by the performer, employed by the complainant, were essential to its successful representation, and that the representation by the defendants of such drama incorporating such changes therein was a violation of the complainant's rights.

10. That although the complainant published such drama by its public representation, yet the defendants were not enabled to perform it by knowledge derived from such publication.

It also appeared by such opinion that the court declined to pass on the question whether the defendants were guilty of fraud in performing from the copy of the drama obtained by Silsbee and transferred by his widow to them, upon the ground that there was no averment in the complaint of its being surreptitiously or improperly obtained. No evidence seems to have been introduced or inquiry made as to the mode in which Silsbee acquired the copy of the original manuscript possessed by him, which afterward came into the possession of the defendants. The main issues made by the pleadings in this action are substantially :

1. Whether the plaintiff acquired the literary proprietorship of the original drama by purchase from the original author, and by the employees and agents caused many additions and alterations and verbal changes to be made in such manuscript, suggested by her skill and experience in such matters, enhancing its popularity.

2. Whether she kept or still keeps the manuscript of such drama unpublished or unprinted, not circulated or dedicated to the public otherwise than by her dramatic representation.

3. Whether the defendant, Clarke, has procured a copy of

People *ex rel.* Bradley v. Stephens.

such drama from a surreptitious source, and has given a representation, and intends to give others, of such drama in the city of New York, by means of such copy and of information given by actors at the plaintiff's theatre, with knowledge of her rights.

4. Whether the drama so performed by him is identical with that which is the plaintiff's property, introducing therein most of the additions, and verbal changes made by the plaintiff or her employees at her theatre.

Some of such issues were clearly adjudicated in favor of the plaintiff in the suit in the United States circuit court already mentioned, such as the acquisition of the literary proprietorship of the drama in question by the plaintiff, although others, such as the identity of the piece performed by the defendants in New York, with the manuscript original in the possession of the plaintiff, as modified by changes made by persons in her employ, with a view to a performance at her theatre, were not. I think, therefore, it was material evidence in the action, and should have been admitted.

For these reasons I think the judgment appealed from should be reversed and a new trial awarded, with costs.

THE PEOPLE, *on the relation of* BRADLEY, *against* STEPHENS.

Supreme Court, First District ; At Chambers, December, 1866.

Under the provision of the act of 1866 (Laws of 1866, 2056),—relating to the Croton aqueduct department in the city of New York, and providing that any vacancy in their number shall be filled by the members of the board remaining in office,—the vacancies referred to are those in the board, and not in the offices of the previously named engineer and assistant commissioner.

A law providing for raising money by taxes, in one county of the state, is not to be regarded as a local statute, within the provision of the constitution requiring the object of local statutes to be expressed in the title.

Mandamus is not the proper remedy to test a claim to the office of president of a board of public officers: the claim of the possession of the books and papers should be tried by the proceedings provided for that purpose, by statute; and the title to office should be tried by an action of *quo warranto*.

Revised
4-1-My. 619.

People *ex rel.* Bradley *v.* Stephens.

A mandamus should not be issued, as a general rule, in cases where the right of the relator depends upon holding an act of the legislature unconstitutional.

Application for a mandamus.

Thomas Stephens and Robert L. Darragh, the president and assistant commissioner of the Croton aqueduct board, were the defendants in this case. The questions in the case related to the title of the office of president of the board, and arose from the provisions in the act of 1866, relative to the raising of taxes for the use of the corporation of the city of New York. Under that act, the previous incumbent of the office of president, Mr. Stephens, deeming that by its terms his office was continued to him for three years, refused to surrender the office to the relator, John L. Bradley, who had been appointed by the mayor and board of aldermen as his successor.

Bradley accordingly obtained an order to show cause why a mandamus should not issue to compel the defendants to admit the relator to the office. The defendant Stephens made return that he had been, since 1860, president of the board, and still continued to discharge the duties of the office, under the advice of his counsel, and that no other person had been appointed to the office in the manner provided by law.

The return of the other defendant denied that any person had been appointed by himself and the chief engineer, to fill the vacancy in the office of president of the board.

A. R. Lawrence, Jr., for the relator.—I. The provisions of the statute, altering the charter of the city in respect to the officers of the Croton department are not valid, under the constitution; because the purpose of the act in this respect is not stated in its title.

II. If the act were constitutional, its plain reading shows it cannot apply to the president of the board, but only to the offices of engineer and assistant commissioners.

Luther R. Marsh and *Waldo Hutchins*, for the defendants,—insisted that the constitutionality of the law should not be determined upon such proceeding as this; and that the proceedings were not sustainable in any case against Mr. Darragh, since he did not claim the office in dispute.

People *ex rel.* Bradley *v.* Stevens.

INGRAHAM, J.—I have considered that point, but am of opinion that Mr. Darragh is a proper party to the proceedings.

Mr. Marsh.—The question at issue is the title to the office. This question should be tried by an action in the nature of *quo warranto*, and not by a mandamus. Again, the provisions of the act are not local or private. And the pronoun "their," in the clause in question, is to be taken as referring to the board as a body, and not simply to the engineer and assistant-engineer.

James T. Brady, for the relator, in reply,—insisted that the rule against issuing a mandamus only applied where the claimant in possession had some color of right, but not where, as in this case the reading of the act showed that he had no right, and the facts were undisputed.

INGRAHAM, J.—The relator was appointed by the mayor and the board of aldermen on the 7th December, 1866, President of the Croton aqueduct board. Stephens had filled that office during the previous term. In May last an act was passed by the legislature for the city tax levy, in which was inserted a provision extending the term of office of the engineer and assistant commissioner for three years from the passage of the act, and then providing as follows: "and any vacancy in their number shall be filled by the members of the board remaining in office" (*Laws of New York*, 1866, 2 vol., p. 2056). The title of this act is "an act to enable the board of supervisors of the county of New York to raise money by tax for the use of the corporation of the city of New York, and in relation to the expenditure thereof." The grounds on which this application is based are, that the term of the president is not extended, that the whole of the provision relating to the officers of this department is void, because the object of it is not stated in the title, as required by the constitution, and that the words, "any of their number," only applies to the engineer and assistant commissioner, and not to the other members of the board.

No question can arise in this case as to the extension of the term of office of the respondent, because it is clear that he was not included under the term of engineer or assistant commissioner, and the extended term only applies to those two

officers. The questions then which apply to this case are whether this act is a local act, whether if it be local this provision relating to these officers is void, and whether the words "vacancy in their number" applies to the whole board or to the officers previously named in the section.

Upon the latter question I entertain no doubt. The words "vacancy in their number" must be referred to what follows, "by the members of the board remaining in office," for its interpretation. "In their number," means the number of the members of the board, and the words, "remaining in office," includes the president as an appointing power, if either of the other members should vacate the office, and include his office, if it should become vacant, as one to be filled by other members of the board. There is no grammatical rule which forbids this construction of the sentence, but such use of the pronoun preceding the subject of it is very common.

The main question is as to the constitutionality of the provisions above referred to. It is contended on the part of the relator that the same are void, because they conflict with the provisions of the constitution contained in the 16th section of the 3rd article, viz.: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Under this provision it has been held that when matters are inserted in a local statute and not expressed in the title, such provisions are void (*Town of Fishkill v. Fishkill and Beekman Plank Road Company*, 22 *Barb.*, 634-643), but do not invalidate those enactments which are specified in the title (*Philips v. The Mayor, &c.*, 1 *Hilt.*, 483). I have not been able to find any direct adjudication that a law providing for raising moneys for taxes in a city or county is a local law. This appears to have been passed over without notice or objection in those cases in which provisions deemed inconsistent with the title have been incorporated in tax laws, as in the *Sun Mutual Insurance Company v. The Mayor, &c.* (4 *Selden*, 241). In *The People v. McCann* (16 *N. Y.*, 58), BOWEN, J., in reference to a local act containing provisions of a general character, says it is not to be deemed a private or local act because its title so indicates. The character of it is to be determined by its provisions and not its title. Some of the purposes for which

People ex rel. Bradley v. Stephens.

money is to be raised by this act are for purposes arising under state laws, such as the metropolitan boards, and render it doubtful whether such laws ought not to be considered of a general instead of a local character. A similar suggestion was made in relation to the act amending the city charter, in *Phillips v. The Mayor, &c.*, (1 *Hilton*, 483). In *Baldwin v. The Mayor* (42 *Barb.*, 449), it was in like manner assumed that a tax law was a local law; and CLERKE, J., held that a provision inserted therein not mentioned in the title was void. This question, however, only arose collaterally as to the right of the attorney to appear in the case, and has not been re-examined when this case has been before the general term for review, but the same was disposed of on other grounds.

Under the decisions of the court of appeals in regard to the police law, the fire department, and the health law, it must be conceded that acts which in any manner affect any part of the state, outside of the limits of the city of New York, will not be considered local acts, but for all purposes and powers of legislation are to be treated as acts of a general character not within the constitutional restriction above referred to.

Personally, I have endeavored, in accordance with views entertained by me on the subject, to protect the city rights and preserve its franchises, by holding that these restrictions were applicable to laws relating to the business of the city, but I have been admonished by those decisions of the court of appeals that such views were erroneous, and it is my duty to yield obedience thereto.

Independent of these views it is a matter of great doubt whether a mandamus is a proper remedy in this case. The relator, if properly appointed, is an officer, he having taken the oath of office. I know of no acts that the respondent can do to admit a man into the possession of an office after he has been duly appointed and sworn in. It is true they withhold from him the books and papers, but they are also withheld by the other members of the board. If either of them agree with the relator, then these two forming a majority have a better remedy by an application for the books and papers of the office. Nor can a mandamus issue to Stephens, requiring him to deliver possession of the office to the relator, because his associates with him have an equal right thereto.

People *ex rel.* Bradley *v.* Stevens.

All such matters must be controlled by a majority of the board, and not by any one member of it. Besides a *mandamus* is never granted to enforce a doubtful right. A party must have a clear legal right to demand what he asks for, or it will be refused (1 *Wend.*, 324; 13 *Id.*, 366; 1 *Kern.*, 563): so where the party has any other specific legal remedy. In the *People v. Stevens* (5 *Hill*, 616, 627), such an application was denied, on the ground that a better remedy existed, and that another claimed the office under color of title. In the *People v. Dikeman* (7 *How. Pr.*, 124, 128), Judge STRONG lays down the following principles as applicable to cases of this kind:

1. That a *mandamus* is inappropriate, and should not be issued where there is a real and substantial dispute as to the title to an office. 2. That where the right of the applicant is clear and unquestionable, and the possession of the books and papers is all that is necessary to enable him to perform the duties of the office, a resort should be had to a direct proceeding to obtain such books, &c., under the statute. And, 3. When the title of the applicant to an office is beyond substantial dispute, so that the objection to it is wholly frivolous, and the possession of the books and papers would not give control of the office, a writ of *mandamus* would be proper, and should be awarded. These rules I think consistent with the decisions, and are applicable to the present case.

That there is a fair ground of dispute as to the title to this office, is apparent from what I have before stated, depending upon the validity of the acts of the legislature. If that act is valid, the power of appointment is taken from the mayor and aldermen, and is vested in the members of the board of the Croton aqueduct, and in order to sustain the claim of the relator, it is necessary to declare that act unconstitutional. And secondly, the possession of the books and papers is all that is now necessary to enable him to discharge the duties of the office.

I do not mean to be understood as holding that the title to the office can be tried in a proceeding for the possession of the books and papers. On the contrary, it cannot be, and such a proceeding should not be resorted to for that purpose. Nor is the writ of *mandamus* any more the appropriate remedy; but that question must be tried by *quo warranto*, or in the mode provided for in the Code.

Petrie v. Fitzgerald.

There are in the present case other difficulties in the way of obtaining the books and papers of the office, which seem to preclude a resort to any summary mode to obtain possession of the books or office. It is that the duties of the board are administered by three persons of equal authority, and the union of two at least is necessary for any legal right to the possession of the books and papers. A majority can control their custody, and no one has a right to demand such possession. If the other members of the board would act with the relator, such an application might be maintained.

I may add, also, to the reasons above stated, that it is rarely, if ever, proper to award a *mandamus* in a case in which it can only be done by declaring an act of the legislature unconstitutional. That should be done in a more solemn mode of adjudication, upon a full trial, and not on an ordinary motion, such as this.

For these reasons I am of the opinion that the application for a *mandamus* should be denied, but without costs.

PETRIE *against* FITZGERALD.

New York Common Pleas; Special Term, June, 1864.

MOTIONS AND ORDERS.—EXTENSION OF TIME TO ANSWER.—
ENTRY OF JUDGMENT.—GENERAL APPEARANCE.

An order staying proceedings until the hearing and decision of an appeal does not extend the time to answer beyond the time of the decision of the appeal.

Where such a stay has been made, it is at end as soon as the order upon the decision of the appeal has been entered of record; and the plaintiff is then at liberty to proceed, without regard to whether the defendant has had notice of the decision.

After such decision has been entered, it is irregular for the defendant to apply *ex parte* for an order to extend his time to answer, it having already expired. His proper course would be to apply on notice to be relieved from default, and have leave to answer.

The omission to give notice of an adjustment of costs, before entering judgment on default, does not affect the regularity of the judgment. At most it is only ground for striking the costs from the judgment.

Petrie v. Fitzgerald.

Motion to set aside judgments in two actions.

The actions were brought by Alexander S. Petrie and others, against Michael Fitzgerald.

The defendant, having been arrested, moved to set aside the proceedings, and the motion was denied; but the judge deeming the questions presented by the defendant of such importance and doubt as to render a review of his decision by the court at general term proper, ordered that the proceedings be stayed until the defendant could appeal to the court at general term, and until such appeal be heard and decided.

The appeal was heard at the February term of the court; and on the 24th day of May, the plaintiffs' attorney served upon the defendant's attorney a notice of the affirmance of the order appealed from. Before the date at which this decision was rendered, the usual time to answer in each action had wholly expired. Defendant, upon being informed of the affirmance of the order, applied to a judge of the court, and obtained an extension of his time to answer; and on the next day served a copy of the order upon the plaintiffs' attorneys, who then informed him that judgments had already been entered in both cases.

The defendant's attorney, upon an affidavit stating these facts, and that this information was the first notice which he had that judgment had been entered, obtained an order to show cause why the judgments should not be set aside and the executions issued thereon vacated, and staying proceedings in the mean time.

In support of his motion, the defendant's attorney presented an affidavit of his clerk, stating that he, the attorney, never appeared generally for the defendant in these actions, until after the appeal to the court at general term, from the orders denying defendant's motion to vacate and set aside the service of process and the arrest, but, on the contrary, that he designated himself as attorney for the purposes of the motion, and on the appeal.

J. S. Ritterband, and *S. B. H. Judah*, for the motion.

George C. Barrett, opposed.

CARDOZO, J.—For the purpose of deciding these motions, it may be assumed that Mr. Ritterband is to be regarded as having appeared generally in the action as the defendant's attorney.

The order staying proceedings until the hearing and decision of the appeals, from the orders denying the motions to discharge the defendant from arrest, did not extend the defendant's time to answer, and was spent, certainly, as soon as the decisions of the court had been perfected by the entry of the order affirming the orders appealed from, which was done on the twenty-third of May. It was not necessary that notice of the entry of the order should be given. The decision was, in the fullest sense, made when the order was entered, and became part of the records of the court. The moment this was done, the stay ceased, and the plaintiff was at liberty to proceed in the action, and as there was nothing extending the time to answer, which had previously expired, the plaintiff had the right to judgment. The defendant was then in default, and even if the plaintiff had not proceeded to take judgment, the defendant was irregular in the *ex parte* application upon which, on the twenty-fourth, he obtained an order extending his time to answer twenty days. There was nothing to "extend;"—his time had expired; he was already in default, and he could not, upon an *ex-parte* application, be relieved from that default. His proper remedy was to apply on notice to the plaintiff's attorney to be relieved from the default, and for leave to answer. It is clear, therefore, that the defendant's position is not strengthened by the order made on the twenty-fourth, after the time for answering had long expired.

The plaintiff having thus a clear right on the twenty-third of May, after the entry of the orders of affirmance, to proceed in the action, what was the effect, treating Mr. Ritterband as having appeared generally in the action for the defendant, of the failure to give notice of adjustment of costs, which certainly was all that Mr. Ritterband had in any view the right to claim?

Under the old practice, the only consequence of such an omission would have been to give the defendant a right to have a re-taxation of the costs at the plaintiff's expense, and in case

New York Piano Co. v. New Haven Steamboat Co.

of any deduction from the bill, to have the amount credited upon the execution.

When the Code first took effect, some cases certainly went the length of the holding that the omission to give notice of adjustment of costs affected the regularity of the judgment; but the later cases, and as I think much more correctly, adhere to the rule prevailing before the Code (see *Stimson v. Hugins*, 16 *Barb.*, 658.)

The utmost extent to which the objection can go, is to require the costs to be stricken from the judgment. In other respects the judgment certainly must be regular. I conclude, therefore, that the entry of judgment upon default, without notice of adjustment of costs, although the defendant has duly appeared, does not affect the regularity of the judgment, so as to entitle the defendant to have it set aside; and that being the whole of the present motion, it must be denied, but under the circumstances, without costs, and without prejudice to any application on the merits, which the defendant may be advised to make.

Ordered accordingly.

*25 Criticism,
Overruled 4-1 May. 149.*

THE NEW YORK PIANO COMPANY *against* THE
NEW HAVEN STEAMBOAT COMPANY.

New York Superior Court; Special Term, February, 1867.

CORPORATIONS.—CITIZENSHIP.—REMOVAL OF CAUSES.

Upon an application for the removal of a cause on the ground of citizenship or residence of a corporation which is a party thereto, the corporation will not be deemed a non-resident of a State, although chartered by the laws of another State, if it has a regular place of business within the State in which the action is pending, and has there an agent upon whom, by law, process may be served, and who has agreed to admit service of process.

New York Piano Co. v. New Haven Steamboat Co.

The allegations of a petition for the removal of a cause from a State court to a court of the United States, under the provisions of the judiciary act, are not deemed conclusive, but may be controverted by the plaintiff.

Motion for the removal of the cause to the circuit court of the United States.

This action was brought by the plaintiffs, a corporation established in the State of New York, against the defendants, who were a corporation formed under the laws of the State of Connecticut, to recover the value of goods destroyed in the city of New York in the defendants' warehouse.

The defendants applied, upon petition, to remove the cause from this court into the circuit court of the United States for the southern district of New York, on the grounds, alleged in the petition, that the defendants, being incorporated by the laws of Connecticut, were to be deemed citizens of that State, within the meaning of the provision of the judiciary act regulating the removal of causes.

The motion was opposed by the plaintiffs, upon an affidavit stating the nature of the cause of action, and that the facts from which it arose occurred in this city; and alleging that the defendants have their agencies, docks, warehouses, and everything necessary for the carrying on of their business established in this city; and also alleging that the general agent of the defendants, appointed by them under the provisions of the laws of New York,—which require foreign corporations doing business in this State to appoint agents here, upon whom process may be served,—had agreed to admit the service of process in this action.

Owen, Gray & Owen, for the motion.

G. W. Cotterill, opposed.

ROBERTSON, Ch. J.—A corporation being an artificial creature of the law, it is a matter of no little difficulty to determine the tests by which its citizenship, within the meaning of the twelfth section of the judiciary act of Congress of the United States, passed in 1789 (1 *Stat. at L.*, 78–80), is to be ascertained.

It was decided at quite an early period after the passage of

this act that the mere creation of a corporation by the laws of a State, did not necessarily make it as a person, a citizen of that State, within the meaning of that section, because its corporators might belong to different States (*Hope Insurance Company v. Boardman*, 5 *Cranch*, 57; *Bank of the United States v. Deveaux*, *Id.*, 61), and it was held so until quite lately (*Bank of Vicksburg v. Slocomb*, 14 *Pet.*, 60).

Subsequently it was held (as I understand it) that the State by whose laws a corporation is created determines its citizenship in the absence of any other test (*Louisville, &c. R. R. Co. v. Letson*, 2 *How. S. Ct.*, 497), in the same manner as the birthplace of a natural person determines his citizenship, in the absence of any proof of a change of residence.

Such a doctrine is not inconsistent with the application of the test of either a natural or artificial person acquiring a residence elsewhere by carrying on their principal functions there. The principal functions of a corporation, and, indeed, the only mode in which its existence is actually made known to the community, is the transaction of the business for which it is chartered; and that is carefully added in the case last cited as a necessary qualification of citizenship of a corporation in the State from which it derived its charter. Such is the interpretation given to such act in the case of *Stevens v. Phenix Insurance Company* (24 *How. Pr.*, 518), in the supreme court of this State; and I see no reason to differ from the opinion given in that case.

I do not perceive that the law of this State, prescribing that insurance companies should comply with certain requisitions before they should be allowed to transact business here, makes any distinction in the cases. It does not make them corporations of this State, or confer any special privileges. Of course the locality (if such a term can be applied to it) of a corporation must be determined in some measure by the same tests as the residence of natural persons. Where the principal part of its business is done is its locality; it may have necessary buildings and employees in other places, such as had the defendants in the case of *Brooklyn Ferry Company v. Norwich and New York Transportation Company* (*Supreme Court, General Term, Second District*), but that does not change its loca-

New York Piano Co. v. New Haven Steamboat Co.

tion, so far as citizenship under the United States judiciary act is concerned.

I do not understand that the supreme court of the United States, in any decisions made by them, have held that the allegations in a petition for removal of a cause are to be considered as conclusive. Otherwise, it might be removed upon a false statement in any case. The affidavit of the attorney for the plaintiffs in this case states "that the defendants have "their agencies, docks, warehouses, and everything necessary "to the carrying on of said business established in the city of "New York," and that the cause of action in this case was for chattels destroyed in their warehouse in this city. It also shows that the general agent of the defendants, appointed under the provisions of the law of this State, requiring the appointment of persons by foreign corporations doing business in this State, upon whom process from the courts of this State against them could be served, agreed to admit service of process.

The very appointment of such an agent for such a purpose, in order to obtain the privilege of transacting business in this State, and the agreement by such agent to accept service of process, is virtually an admission of citizenship in this State for the purposes of such action. The object of the provision of the constitution giving the Federal courts jurisdiction over suits between citizens of different States, was to secure impartiality in the administration of justice. A corporation which may have aliens and citizens of all the States among its incorporators, and which agrees, in order to acquire the right of doing business in another State from that where it was chartered, to appoint an agent, on whom process issuing out of the courts of that State may be served, may be fairly presumed to trust to the impartiality with which the courts of such last State will administer justice to it, and is estopped from setting up citizenship, or rather, location of its place of business elsewhere. The petition simply states that the principal office of the business of the defendants is in the State of Connecticut, its stockholders and directors meet, and its records are kept, and its governing power issues its orders there; this may all be, and yet the public have no knowledge of such exercise of functions there. The palpable, visible, practical conducting

Matter of Wheeler.

of its daily business in the city of New York is better proof of its real residence, if such a term be proper.

The motion must be denied, with costs.*

MATTER OF WHEELER.

Supreme Court, First District; Special Term, December, 1866.

CORPORATIONS.—ELECTION.—OATH.

Of the right of voting in corporations, on stock irregularly issued.

In an emergency and contingency in which the forms of procedure prescribed by the charter in respect to elections, fail to accomplish the purposes con-

* In the case of *SIEBRECHT against BUTLER*, and several other actions by other plaintiffs against the same defendant (*Supreme Court, First District; Special Term, 1866*), the removal of the causes was ordered, on the ground that the acts for which the defendant was sued were done by him as an officer of the United States army, and under and by virtue of authority, derived from the president and acts of Congress of the United States; and that, therefore, the case was within the act of Congress of 1863, entitling defendants in such cases to have a removal of the cause to a court of the United States.

The action of the plaintiff *SIEBRECHT*, was brought to recover compensation for services performed by him in New Orleans, upon compulsion of the defendant when he was in command of the United States army there.

The action of the plaintiff *TILDEN*, alleged the conversion by the defendant of a vessel belonging to the plaintiff, at New Orleans, for the purchase of which from the plaintiff, the defendant had attempted to negotiate, but without coming to an agreement with him in reference to the price.

The action of the plaintiff *KEARNEY*, was to recover for property belonging to him which he alleged the defendant, when in command at New Orleans, had seized upon pretence that it was seized for the government, compelling the plaintiff to receive an inadequate compensation therefor.

The plaintiff *LESTER* brought two actions, one for false imprisonment, and one for the conversion of his property, alleging that he was arrested by the defendant when the latter was in command, and his property taken from him.

Messrs. Brown, Doolittle, Choate and Campbell, for the plaintiffs,—insisted that the causes of action were not acts under the authority derived from the president, within the meaning of the statute.

Messrs. Hackett and Trall, for the defendant.

BARNARD, J.—As I construe the different acts of Congress, the defendant is entitled, as a matter of course, on filing a verified petition, to have those causes removed for trial to the United States courts. I cannot see what difference it would make to plaintiffs in what court they are tried. The United States court can try them as carefully and speedily as the State court. No delay will ensue, as the court is always in session. Motions granted.

18 Hallowed,
John \$27.43

Matter of Wheeler.

templated, so that the necessary offices are vacated, it is competent for the incorporators themselves to exercise the power of election, and provide for the appointment of inspectors for that purpose.

An election of directors of a corporation is not invalid or to be set aside as irregular, because the oath actually administered to them, was not subscribed by them.

Petition to have an election of directors of the Atlantic Mail Steamship Company set aside.

The facts are stated in the opinion of the court.

MASON, J.—This case comes before the court on the petition of the above named parties, under and by virtue of the authority conferred by sections 49 and 50, 2 R. S., 525, fifth edition. The 49th section authorizes the application, and the 50th section declares that it shall be the duty of the supreme court, upon such application to proceed forthwith in a summary way to hear the proofs and allegations of the parties, &c., and thereupon to make such order and grant such relief as the circumstances and justice of the case shall seem to require, and then declares that if the election complained of shall be set aside, the supreme court may order a new election, &c. These petitioners seek by these proceedings to have declared invalid and set aside the election of directors of the Atlantic Mail Steamship Company, held on the 13th day of November, 1866.

This election is sought to be set aside because all the stockholders of the \$4,000,000 increased stock were deprived of their right to vote in the election of such directors. The stockholders of this new stock were restrained by injunction issuing out of the court of common pleas of this city, and which was served on the day and just as the inspectors of election were about to proceed with the election. I will only say that the injunction itself should be regarded, perhaps, as *prima facie* evidence of their having no right to vote on this stock.

The respondents, however, have gone into the whole merits of this case, and have shown to my entire satisfaction that this \$4,000,000 new stock, or all that has been issued of it, was issued illegally and in fraud of the rights of the other stockholders. In the first place, the charter of this company fixes the number of the directors to be seven, and no person who is not a stockholder can be a director in the company; and

Matter of Wheeler.

secondly, the notice of the meeting to vote an increase of the capital is required by the statute to be signed by a majority of the directors, and the notice in this case was only signed by four, including Secor, who was not a stockholder, and could not act as a director. The notice being deficient, the vote to increase the stock \$4,000,000 was illegal. The vote then and there taken disposing of a large share of this stock in the purchase of the stock of other steamship companies was illegal for two reasons. Among others which might be stated, there was only a very small portion of the stock voted on personally, but a little over \$8,000 of it in favor, while nearly \$25,000, was voted on by proxy. These proxies did not authorize these parties to vote on that stock for any purpose, but simply on the question of increase of the capital stock. This stock was illegally issued, because it was issued for objects and purposes entirely foreign to the business for which this corporation was created; and if we take into consideration the whole scheme and plan of the arrangement upon which it was issued, it is not saying too much to affirm that it was entirely destructive of the objects contemplated by the charter of this corporation; for in the purchase of these other lines they bind themselves not to use their own franchise. It cannot be pretended for a moment that these directors could deal with this stock in this extraordinary manner, for their own advantage and gain, without authority from the stockholders. As I understand the law, all these old stockholders had a right to shares in the issuing of this new stock in proportion to the amount of stock held by them. And if none of the stock was to be apportioned to the old stockholders, they had certainly the right to have the new stock sold at public sale, and to the highest bidder, that they might share in the gains arising from the sale. In short, the old stockholders, as this was good stock and above par, had a property in the new stock, or a right at least to be secured the profits to be derived from a fair sale of it, if they did not wish to purchase it themselves; and they have been deprived of this by the course which these directors have taken with this new stock by transferring or issuing it to themselves and others in a manner not authorized by law.

The next question to be considered is whether the election complained of was valid. The inspectors of election, whose

Matter of Wheeler.

duty it was to have acted on the 12th of Nov., 1866, and held the election, refused to go on and act, and the stockholders, who were lawfully convened by a proper call for the election, after the inspectors refused to hold the election, went on and appointed or elected new inspectors of election, who held the election, received all the votes of those entitled to vote, and conducted the election in all respects fairly and legally; and the election of directors was valid, if the stockholders had the right to proceed under the circumstances and elect new inspectors of election. There was not a majority of the directors present, and application was made to the two who were present to appoint new directors, and they refused. They were right in refusing, for they had no authority to appoint, as it required a majority of the board. The stockholders were in a condition where no majority of the directors could be got on the day, and there must have been a failure to elect if the stockholders could not proceed in the manner they did.

I incline to think that these corporators had the right to proceed and elect inspectors of election and proceed in the manner they did. By the R. S., "Every corporation, as such, has power to have perpetual succession by its corporate name for the period limited in its charter, and when no period is limited perpetually." Also, "To appoint such subordinate officers and agents as the business of the corporation shall require." These are no more than the common law rights incident to every corporation, and our statute declares they shall vest in every corporation. The power to elect directors, who shall have the control and management of the affairs of the corporation, may be under some circumstances vital to preserve its succession and organized existence. The transactions of this corporation for the last few months show that its corporate existence was in peril. The directors in office at the time of the election complained of, by their unlawful dealings with the affairs and interests of the corporation, had quite likely forfeited their charter if the State should intervene. I will not enter upon any discussion of the authorities referred to on the argument of this case, but will content myself by simply saying that such an emergency and contingency had arisen that the ordinary forms of procedure prescribed and contemplated by the charter and laws regulating these elections had

Pardo v. Osgood.

suddenly failed to accomplish the purposes contemplated by them, in so much that under the circumstances the corporators themselves had the right to exercise the power themselves, and provide for the appointment of inspectors of election, and proceed in the manner they did. The fact that the oath was not subscribed by these inspectors of election cannot invalidate the election, certainly, where a proper oath was administered to them. I have abstained from considering the question whether those provisions of the law, giving directions as to the manner of holding these elections, and which were not observed in this case, are to be considered under ordinary circumstances directory, but prefer to place the case upon the ground that where those regulations, which were intended merely to preserve and regulate the rights of the stockholders tend, in their strict observance, to the destruction of those corporate rights, instead of their preservation, a departure from them by the corporators should be sustained in law.

This application to remove and declare invalid this election of directors, held on the 13th of November last, must be denied.

PARDO *against* OSGOOD.

New York Superior Court ; Special Term, February, 1867.

SET-OFF.—CLAIMS BY AND AGAINST RECEIVER OF CORPORATION.—
PLEADING.—STIPULATIONS IN POLICY.

After an insurance company has become insolvent, the obligation of an insurer upon his premium note cannot be set off against his claim on the company for a loss.

The complaint may be attacked upon demurrer to an answer.

The provisions of the Revised Statutes regulating set-offs explained and applied.

The usual stipulation in insurance policies of mutual companies, to pay the loss after deducting the premium note if unpaid, is for the benefit of the company, and does not make a claim for a loss, and a debt upon the note, a case of mutual credits within the meaning of the statute.

*5 Reversed
Robt. 348*

Pardo v. Osgood.

Demurrer to answer.

This action was brought by Moses Pardo, Jr., against George A. Osgood and Cyrus Curtis, receivers of the Columbian Insurance Co., upon a policy of insurance issued by the company before it became insolvent.

Upon procuring the policy, the plaintiff gave his premium note to the company. On or before the 20th of January, 1866, a loss occurred on which the plaintiff claimed \$2,252, and presented proof of the loss accordingly. The company became insolvent, and the company were appointed receivers on the 23d day of January, 1866.

The proofs of loss were presented in March to the company's receivers. The premium note given by the plaintiff was payable in April. The plaintiff brought this action on his policy to recover the amount of the loss. The defendants by their answer set up their claim upon the premium note, and claimed that the plaintiff was not entitled to set-off his demand because it did not become due, before the publication of the receivers' notice, provided for by the statute. To this answer the plaintiff demurred.

Albert Mathews, in support of the demurrer.

Dudley Field, for the defendants.

ROBERTSON, C. J.—The answer in this case sets up as a bar to any set-offs of the plaintiff of any demand claimed by him that did not become due before the first publication of a notice therein set forth, corresponding with the one required by the Revised Statutes to be published by such a receiver as the defendants are (*Vol. 2, p. 43, § 8; p. 469, § 70*). They so claim it upon the grounds that by certain provisions of such statutes (*2 Vol. 464; § 42, 469; § 72, 470, 74*), a certain other provision thereof (*2 Rev. Stat., 41, § 7*), excluding set-offs of debts of debtors (established to be absent, absconding, concealed, insolvent or imprisoned) when the same do not become due before the publication of certain notices in some cases, the appointment of trustees of such debtors in others, and the commencement of proceedings against them by petition, on others, in all actions brought by the trustees of such debtors against

Pardo v. Osgood.

the party claiming the set-off. There are, however, some objections to such a position, one of which, at least, is insurmountable. It is somewhat doubtful, to say the least, whether the enumeration in one of the provisions just referred to (2 *Rev. Stat.*, 469, § 72), of some of the subjects of provisions in regard to trustees of insolvent debtors, which are declared to apply to receivers, does not restrict the generality of the previous language, which applies all statutory provisions in regard to such trustees to such receivers as the defendants, and also whether the exclusion of a right to set-off properly forms part of the powers and duties of such trustees, conferred upon receivers, by the other provisions so referred to (2 *Rev. Stat.*, 454, 442, 470, § 74). But the insurmountable difficulty is, that there is nothing in the section already alluded to as excluding set-off (2 *Rev. Stat.*, 41, § 7), which can be made applicable to such receivers. The only notices therein spoken of are those of attachments against absent, concealed or absconding debtors, or of applications to discharge an imprisoned debtor; while the right of set-off in regard to insolvent debtors is cut off either from the time of the presentation of the petition for their discharge or the appointment of trustees. Indeed, the only object of the notice, set up in the answer, seems to be to prevent a settlement with the officers of the company. The defendants are therefore neither entitled to set-off nor are they limited by the publication of such notice.

As, however, the complaint may on a demurrer to an answer be attacked (*People v. Banker*, 8 *How. Pr.*, 261; *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 1 *Code R. N. S.*, 238; *Schwartz v. Furniss*, 1 *Code R. N. S.*, 342; *Noxon v. Bentley*, 7 *How. Pr.*, 316), even if in addition to the facts contained in the complaint, the answer contained nothing to defeat the cause of action, it would be necessary to determine the plaintiff's right of set-off. And if it appears by such pleadings that the plaintiff's demand did not accrue before the appointment of the defendants as receivers, if in such case he would be entitled to no relief, judgment must be given for the defendant. If the plaintiff's demand became due before the appointment of the defendants as receivers, he could set it off against any demand held against him by the defendants as receivers, although the latter became due after their appointment as such (*In re Middle*

Pardo v. Osgood.

District Bank, 1 *Paige*, 585). The Revised Statutes permit it (*vol. 2, p. 354, § 18, subd. 8 and 9; Myers v. Davis, 22 N. Y., 491, per DENIO, J.*); courts of equity in this State (*Holbrook v. Receivers of Am. Ins. Co., 6 Paige, 220; McLaren v. Pennington, 1 Paige, 112; In re Middle District Bank, ubi sup.*); and courts of law in sister States, (*McDonald v. Webster, 2 Mass. Rep., 498; Van Wagoner Receivers v. The Paterson Gas Light Co., 3 Zab., 283*), sustain the same principle, and it is applied under the English bankrupt acts (*1 Mod. Rep., 215; Greaves v. Powell, 2 Vern., 248. And see Chapman v. Derby, Id., 117; Atk. 2, 612; Mitford v. Mitford, 9 Vesey, 100; Exp. Stephens, 11 Vesey, 26*).

But in the present case, the demand of the plaintiff, by the terms of the policy, did not accrue until thirty days after proof of his loss. The contract of the company of whom the defendants were receivers, was to pay only at that time any loss which had previously accrued, and the statute of limitations could only then begin to run. No proof of loss was presented until after the defendants' appointment, and the plaintiff's note was not then due. It becomes necessary, therefore, to determine whether the plaintiff had a right to or the defendants were bound to allow such set-off.

The provisions of the revised statutes giving authority to the trustees of certain kind of debtors, including insolvent ones, to allow set-offs of credits or debts whenever *mutual credit* has been given by such debtors and other persons, or *mutual debts* have subsisted between them, and pay the proportions of or receive the balance due (*2 Rev. Stat., 47, § 36*), may be considered as rendered applicable by the other provisions to receivers, such as the defendants, but must be accompanied by the provision therein contained, that the parties making such set-off must be such as would be entitled under a prior section excludes all who were not creditors at the time of the assignment (in this case the appointment). Whether this alters the plaintiff's rights remains hereafter to be considered.

The first question that arises is whether without such provision the plaintiff had not a right to set-off.

In all the cases already referred to, where a party to whom

a demand was due from a debtor, either an individual or corporation, at the time of the transfer of his or its interest in a claim against such a party to a receiver, or the assignee of a bankrupt or insolvent was allowed to set off such demand against such claim, the decision was put upon the ground that such right of set-off was an equitable defense *pro tanto* at the time of the appointment of the receiver, or assignment to such assignee, and that such receiver not being a purchaser for a valuable consideration, took subject to such equity. But when such demand was not due at the time of such assignment, unless the two claims were connected together by positive agreement, a future right of set-off, when either should become due, was not an equitable defense; they were merely reciprocal demands against each other (*Myers v. Davis*, 22 *N. Y.* 493). A subsequently acquired right of set-off must, therefore, where there are no other equities, depend upon positive statutes, unless the two demands are linked together, during the whole time the credit upon them is running, by an agreement.

It was thus held in *Haxton v. Bishop* (3 *Wend.*, 31), where the plaintiff was the receiver of a bank, and it was held that he represented the creditors, and not the corporation, and that the claim sued for by him was the property of the former. Some fault is found with this position in the case of *Van Wageningen, Receiver v. The Paterson Gas Company* (*supi sup.*), as deviating from the principles laid down in other cases, that receivers are not purchasers for a valuable consideration; but that doctrine is only invoked in reference to equities existing at the time of the appointment, and could not affect a perfectly legal transfer of title of one debt, which destroyed the mutuality of both before any equity could arise, and thereby prevented its being created.

The same principle has been adopted in regard to voluntary assignments by insolvent debtors (*Chance v. Isaacs*, 5 *Paige*, 592; *Hicks v. McGrorty*, 2 *Duer*, 295; *Myers v. Davis*, 22 *N. Y.*, 489); and even in the case of deceased insolvents (*Bradley v. Angel*, 3 *N. Y.* [3 *Comst.*], 475). Set-offs are allowed by statute against an assignee only when admissible against the assignor, while he owned the subject of the action (2 *Rev. Stat.*, 354, § 18, *subd.* 89), and no exception is made in it by reason of the consideration for the assignment.

It still remains to be seen, however, whether this is a case of mutual debts or credits, under the provision of the revised statutes authorizing trustees of certain kind of debtors to allow set-offs (2 *Rev. Stat.*, 47 § 36). In order to reach that question I must assume when such provision is construed as conferring a right on the creditors therein referred to, to make, as well as giving permission to trustees to allow, a set-off in such cases as is therein prescribed, it still remains so much a part of the powers of such trustees as to be conferred by other provisions of such statutes (2 *Rev. Stat.*, 464, § 42; *Id.*, 469, § 68 and 74), upon such receivers, as seems to have been held in *Holbrook v. Receivers American Insurance Company* (*ubi sup.*), and also that the plaintiff was a creditor of the company in question within the meaning of the prior 33d section (2 *Rev. Stat.*, 47). *Mutual debts* have been defined to be those existing contemporaneously in favor of each party against the other in the same capacity (*Murray v. Toland*, 3 *Johns. Ch.*, 569; *Dale v. Cooke*, 4 *Id.*, 11). *Mutual credits*, where each party has trusted the other or given him or them credit (*Dale v. Cooke* (*ubi sup.*); *Duncan v. Lyon*, 3 *Johns. Ch.*, 351; *Jones v. Robinson*, 26 *Barb.*, 310; *In re Van Allen*, 37 *Id.*, 229). Such provision, however, has been held to extend beyond the set-offs allowed by the general statute, and include those for unliquidated damages (*Holbrook v. Receiver American Insurance Company*, *ubi sup.*), and (by applying the doctrine of equitable set-off in case of insolvency) when only one of the claims was due (*Id.*; and *Berry v. Brett*, 6 *Bosw.*, 627; *In re Van Allen*, *ubi sup.*), but does not seem to have been stretched so far in any case as to include cases where both debts were not due or credit had not expired upon the transfer to a receiver. I apprehend that it was not intended by such provision to alter the contract of the parties so as to shorten the time of credit on both sides and allow one party to commence proceedings substantially to procure the satisfaction of his demand before it becomes due (*Keep v. Lord*, 2 *Duer*, 78). Since he would have as much right, under such a construction of that provision, to insist on the set-off the moment the receivers were appointed as by waiting until the time of either credit first expired under such statutory provision, no question can arise as to the want of any consider-

ation proceeding from the receivers for the demand assigned to them, it is a pure question of construction of its words.

The English bankrupt act has a similar provision, using the words "mutual credits" (5 *Geo. 2, chap. 30*, § 28, 6 *Geo. N. C.*, 16), and in all cases where the demand ought to be set-off and not accrue until after the bankruptcy, the right of set-off was refused. Thus premium notes held by an underwriter were excluded in an action by the assignees of the bankrupt, insured for a loss accruing after the bankruptcy and policy of insurance given by such underwriters (*Glenmire v. Edmunds*, 4 *Taunt.*, 775). Moneys paid by a surety for a bankrupt after his bankruptcy (*Samson v. Benton*, 2 *Brod. & B.*, 89). And so strictly was such statute construed that even costs awarded to a bankrupt before his bankruptcy were held not to be capable of being set off against a claim against him due before his failure, because they were not taxed until afterward (*Exp. Rhodes*, 15 *Vesey*, 599). I cannot, therefore, see any reason for construing the same language in our statute differently.

Indeed I see no reason for straining the meaning of the statute so as to give one creditor of the company represented by the defendants a preference over others. As was well said in the matter of Van Allen (*ubi sup.*), "the rights of the receiver become fixed at the time of his appointment, the rights of the creditors of the corporation represented by him then attach, and it would not be equitable to countenance any subsequent arrangement to give any of them an undue preference over others."

I do not regard the stipulation in the policy of the company to pay the loss after deducting the premium note, if unpaid, as being intended for the benefit of any one but themselves. They might pay the whole claim and afterward sue the note or deduct it when they paid the loss before it was due. But the credit, if it may be so called, on either the policy or the note, was not made by such stipulation to depend upon each other, so as to make it a case of mutual credits, particularly as to the note, as it was payable, although no loss ever occurred.

It does not appear by the newspaper memorandum of a case just decided by the supreme court in this district (*Dord & Co. v. Receivers of Col. Ins. Co.*, December, 1866), handed to me in this case, whether the losses claimed by the petitioner did not occur and were not liquidated before the appointment of

Pardo v. Osgood.

the receivers. But it seems to have been a mere application to allow the receivers to make the set-off, and the order only permits the receivers to make the set-off; but in case they refuse the plaintiff is "to have the benefit of the order" in an action which seems to have been pending. The learned judge (INGRAHAM) who passed upon the question admits that it may be difficult at the circuit in an action to recover the face of the note and which, therefore, must have been brought by the receivers, to allow such a set-off when the case is tried by a jury. No authority is cited, nor does the report contain any reasoning to show that if neither of the claims were due when the receivers were appointed it was a case of mutual credit.* With all due deference, therefore, for the learning and ability of the justice who decided that case, I am compelled to abide by the opinion I have formed until better advised, that the present plaintiff cannot sustain his present action under the facts presented.

There must be judgment for the defendants on the demurrer with liberty to the plaintiff to amend on payment of costs.

* The petitioner in this case insured in the Columbian Insurance Company, and gave premium notes. The company having failed, the receiver commenced suit on these notes. The petitioners, on the other hand, had claims against the company to nearly the extent of their notes. Fearing, however, that they could not properly set up these claims in the action, they petitioned the supreme court to compel the receiver to allow them as a set-off. It was argued in opposition to the motion that these claims did not arise until after the dissolution of the company, and were, therefore, not proper offsets against the receivers.

A. W. Speir, for petitioners.

Dudley Field, for respondents.

INGRAHAM, J.—I think the doctrine of equitable set-off where mutual credits have existed applies to these cases; that the claims of the petitioners should be allowed against the notes given to secure the premiums on the insurance. Interest should be allowed on both sides from the time when the payments are due. It is suggested that, in the action now pending, the decision of this question should be made at the circuit. It may be difficult at the circuit in an action to recover the face of the notes—to allow such a set-off—when the case is tried before a jury; at any rate, permission should be given to the receivers to make such a set-off. As they do not admit the amounts claimed by the petitioners, a reference might be necessary to adjust the accounts of both parties. An order should be entered allowing the receivers to make such adjustment, and allow such set-off. If they refuse, and go to trial in the action referred to, the parties may then have the benefit of this order.

De Camp v. Marshall.

DE CAMP *against* MARSHALL.

Supreme Court, Second District; Special Term, Nov., 1866.

ASSIGNMENT FOR BENEFIT OF CREDITORS.—FRAUDULENT INTENT.

An assignment for the benefit of creditors must substantially and fully comply with the provisions of the act of 1860.

An assignment may be set aside if the schedule omits a part of the property, though only for the purpose of diminishing the amount of security to be required from the assignee; or if it directs a larger payment to a creditor than is actually due him.

Trial by the court.

This action was brought by the plaintiff as receiver, appointed in supplementary proceedings, against the defendant Marshall, to set aside a general assignment for the benefit of creditors made by Marshall. The assignee, Mr. Van Pelt, and others, were joined as defendants.

The facts are stated in the opinion of the court.

James R. Hills, for the plaintiff.

J. W. Johnson, for the defendants.

GILBERT, J.—In this case a gentleman of the name of Marshall, on the 20th of November, 1865, made a general assignment of his property for the benefit of his creditors to Mr. De Camp, who is the defendant in this action; and seven or eight days afterward a schedule was prepared and attached to the assignment and filed, pursuant to the act of 1860, and subsequently the county judge directed a bond to be executed in conformity with the statute, in the sum of \$12,000.

On the trial of the action before me yesterday, it appeared that, under the advice of the counsel who prepared the assignment and schedule, the assignor was induced to withhold from the schedule about \$15,000 of his effects, so as to enable the assignee to give the requisite security; the whole amount of the property assigned being \$30,000. And it appeared also.

De Camp v. Marshall.

that among the trusts was a direction to pay one creditor a little over \$2,000, when, in point of fact, the actual indebtedness to such creditor was \$1,400. There are other minor objections to the legality of the proceeding, not material to notice.

The plaintiff here, Mr. De Camp, having been appointed receiver on supplementary proceedings, obtained the authority of the court to sue, and brought an action to set aside this assignment, on the ground that it was made with intent to defraud creditors.

I have looked into the case carefully, and have come to the conclusion that where an assignment is made, and there is not a substantial and full compliance with the statute of 1860, that the courts are bound, as a matter of law, to conclude that the assignment was made with intent to defraud creditors. The statute is evidently a remedial one. It was enacted for the purpose of preventing abuses which had grown up under the former system. Before, assignees were not only permitted to select their own trustees, but to prepare the schedules and turn over the property at their convenience, and not unfrequently they, in effect, made provisions for themselves by fraudulent exaggeration of the amount for which they preferred some friendly creditor. It is a matter of history, known to every lawyer, that these assignments were very frequently, and indeed very commonly, resorted to as a means of forcing a compulsory compromise with creditors, and not intended as a *bona fide* creation of trust. The opportunities for these secret frauds were numerous, and creditors had no means of detecting them. This statute was intended to require the assignors to act in entire good faith, first, in making out the schedule, and secondly, in turning over the property, that *cestuis que* trust under an assignment are also to be protected by adequate security to be given by the assignee for the due execution of his trust. Where, as in this case, a portion of the estate is suppressed for the purpose of diminishing the security, and particularly where direction is given in the assignment to pay a creditor a sum of money greater than is due him, it is certainly the duty of the court to regard the assignment as made with intent to defraud creditors. I do not say that no explanation may be given of acts like those referred to, to rebut actual

fraud. But when they clearly appear, and are known to both parties to the assignment before any attempt to impeach it, and no proceedings are taken to have them corrected, the inference of fraud in fact becomes almost irresistible.

Therefore a decree must be entered declaring the assignment fraudulent and void, and the usual reference is ordered to James Maurice, Esq.

PINE *against* ORMSBEE.

New York Common Pleas; Special Term, December, 1866.

PARTNERSHIP.—ACTION FOR AN ACCOUNTING.—FORM OF DECREE.

A partnership for no definite period is dissolvable by either party by mere notice; and such notice may be implied.

If, after the dissolution of the partnership, either party continues the use of the partnership property, he may be required to account for such use, although it was only a partnership in proceeds, and not in the stock.

Of the requisite provisions of the interlocutory judgment for an accounting in such a case.

Motion for judgment for an accounting.

This action was brought to settle the affairs of a partnership between the parties. Issues of fact were framed, and tried before a jury; and, after their finding upon the issues, the plaintiff moved for a judgment directing an account to be taken, up to the time of trial.

George F. Shea & W. E. Rogers, for the plaintiff.

Emerson & Goodrich, for the defendant;—objected that the accounting should only be directed in respect to the period terminating when the partnership was dissolved.

CARDOZO, J.—I am of opinion that a partnership such as the jury found in this case—that is, one for no definite period—is dissolvable by either party—mere notice by one party to the other would terminate it. I think, also, that a dissolution may be implied from circumstances, and that the withdrawal

of a partner, and his refusal to go on with the business of the partnership, justifies such an inference. (See *Story on Part.*, §§ 269, 272; *Collyer on Part.*, § 109).

The allegation of the bill here is, and, according to my recollection, the proof was, that Mr. Pine withdrew from the partnership on the 2d of February, 1865, and never afterward took any part in it. This, I think, clearly brings the case within the rule that a dissolution by implication should be inferred from the withdrawal of a partner, and his refusal to proceed with the business, but this does not absolutely dispose of the question as to the period to be covered by the accounting. If Mr. Ormsbee had then put aside Mr. Pine's share of the proceeds, and kept it separate and distinct from the moneys with which he carried on business subsequent to the dissolution, I think that period would terminate Mr. Pine's right to an account. But it is perfectly settled that if either partner uses the partnership property (even after dissolution, before final accounting and distribution), and makes profit out of it, he must account for that profit as partnership property, or he may be charged with interest.

Probably at this day no one would question this rule or its applicability if this partnership were an ordinary one in which the partners were interested in the stock. But the fact that they were only interested in the proceeds, can make no difference on principle. If by the use of the proceeds, in which Pine was interested, Ormsbee has made any profit, that profit must be decreed to be partnership property. Mr. Ormsbee could have prevented this consequence either by setting apart, as I have said, Mr. Pine's share, and not using it at all, or by accounting regularly with him, if not by amicable arrangement then by filing his bill in equity for that purpose, and, if he omitted to take either of these methods, and used the partnership funds, he must be treated as doing so as a trustee, and required to account accordingly.

The interlocutory decree should therefore, I think, be something special. It ought to provide absolutely for an accounting from Nov. 24, 1864, to February 2, 1865, and declare Pine's interest in that, and it should also direct the referee to inquire and report whether Mr. Ormsbee had used the proceeds or any part thereof, in which he and Pine were jointly in-

Kowing v. Manly.

terested, in carrying on business since the 2d of February, and if not how he separated them from his other money; and the referee should also take and state an account of the business subsequently to Feb. 2, and down to the time of his report, which will be for the information of the court, so that when it makes a final decree it will be able to say whether Mr. Pine has the right to an account to Feb. 2, only, or to the date of the report; and to fix the amount to which he may be entitled without the trouble of any further reference, according as upon the referee's report, and the pleadings, proofs, and verdict, the court may be of opinion that the one or the other period is to control. The order should also provide that the referee ascertain and report, whether any orders given before February 2, 1865, were filled after that date, and take an account of those transactions separately, as well as in the general account after February 2, because probably, even if Mr. Ormsbee should show such a state of facts as would exempt him from general liabilities after February 2, he might still be bound to account for the proceeds of such transactions. At all events, the whole matter will be before the court, and the final decree can be made without further inquiries being ordered. The proposed interlocutory decree should be conformed to these views, and will be settled on notice to Mr. Ormsbee's attorney.

*57 Garrison
6 Feb. 27. 172. See*

KOWING *against* MANLY.

Supreme Court, Second District; Special Term, Nov., 1866.

NEW TRIAL.—ACTION INVOLVING TORT BY WIFE.—DEFENSES.

A husband cannot maintain an action, the essential basis of which is a tort committed by his wife.

An objection to a recovery may be a sufficient ground for granting a new trial, although not taken at the trial below, if the point is good in law, and could not have been obviated by proof.

Motion for a new trial.

Kowing v. Manly.

This action was brought by Francis P. Kowing against the defendants, who were stock brokers, to recover damages from them for the alleged wrongful delivery of securities in their possession belonging to him, without authority from him.

It appeared upon the trial that the plaintiff had some disagreement with his wife; that he gave the defendants written instructions not to deliver up the securities except upon his own written order; that during his severe illness an order, purporting to be signed by him, was presented to the defendants by the plaintiff's wife, and the securities delivered to her upon it. Medical testimony was given, showing that the defendant was at the time of the date of the order incompetent to sign such an instrument; and the plaintiff contended that the order was a forgery.

The jury found for the plaintiff, and on their verdict judgment was entered for the value of the securities.

The defendants now applied for a new trial upon two grounds; first, alleging the discovery of new evidence on the question of the capacity of the plaintiff at the time referred to; second, on the ground that the action was not maintainable, because it was founded on a fraud committed by the plaintiff's wife.

Sterling & Walden, for the defendants;—insisted that the new evidence offered was not cumulative, and entitled them to a new trial: and that, if the verdict were sustained, the defendants would have a cause of action against the plaintiff for the fraudulent conversion of the securities by his wife; and the law would not, therefore, allow a recovery by him.

Benedict & Thorn, for the plaintiffs;—argued that since the married woman's acts of 1848, and subsequent years, the relations of husband and wife had been changed in this respect.

GILBERT, J.—The error, if any error was committed on the trial, consists in allowing the recovery against the defendants for the value of the bonds which they delivered to the plaintiff's wife, in contravention of his written order to them not to deliver the bonds without his written order. That order, purporting to have been signed by the plaintiff, was presented to the defendants by his wife on the occasion when the bonds were delivered, and they delivered the bonds to her on the faith of

Kowing v. Manly.

her tacit representation that the order was genuine. The only question put to the jury or litigated upon the trial related to the genuineness of the signature to this order. The jury found for the plaintiff, and on this he has entered judgment against the defendants for about \$10,000.

A motion is now made for a new trial, on the ground, among others, that in contemplation of law a delivery of the bonds to the wife was a delivery of them to her husband. This point was not taken on the trial. But I think that fact does not create an insuperable objection to the granting of a new trial. If the point is good in law the plaintiff could not have obviated the objection by any other proof. In such cases it is proper to grant a new trial to prevent injustice. The defense is within the scope of the pleading, and the evidence proves the truth of it.

The question, then, is: Is it a good defense? There can be no doubt that if the defendant had delivered the bonds to the plaintiff himself, such delivery would have barred the action, notwithstanding the plaintiff's written instructions. Was a delivery to the wife equivalent in law to a delivery to the plaintiff personally? I am inclined to think it was. The husband is liable for the torts of his wife. Why? Because a tort committed by her is regarded as the joint act of both. His liability springs solely from the unity of the marital relation. A fraud like that alleged against the wife is the fraud of both (*Reeve's Dom. Rel.*, 3d ed., 72; 2 *Kent*, 149; 2 *E. D. Smith*, 90). I have looked into the record of *Harriet v. Atkins*, decided in this district in 1858, but find in it nothing contrary to this.

It follows, therefore, that, if this view is correct, the defendants, upon the evidence, were entitled to the verdict. They did not get it because neither the attention of the jury nor that of the court was drawn to this point.

It is said that the only mode of enforcing the liability of the husband for the torts of the wife is by action against both jointly, or by a counterclaim. I cannot assent to this. The husband cannot maintain an action the essential basis of which is the fraud of his wife, for which he as well as she is liable. Upon the whole, I think the defendants ought to be afforded an opportunity to have this defense passed upon. The power to grant new trials ought to be liberally exercised for the advancement of justice when no rule of law or of public policy is infringed.

Ackroyd v. Ackroyd.

The motion for a new trial, therefore, is granted on payment, within five days, of the cost of the actions as heretofore taxed, and \$10 costs of this motion. The plaintiff may also suggest other terms, and the order will be settled by me.

ACKROYD *against* ACKROYD.

Supreme Court, First District ; General Term, June, 1866.

APPEAL.—ATTACHMENT FOR CONTEMPT.

An appeal does not lie to the court at general term, from an order made at special term denying a motion for an attachment for disobeying an order of the court, where, under the circumstances of the case, the granting of the attachment was discretionary with the judge below.

Where a defendant, on being required to produce his books and vouchers, and to render an account, produced certain account-books and vouchers, but declined to render any further or other account, and the plaintiff obtained a general order to show cause why he should not be attached for contempt in not producing the required account,—*Held*, that an order denying the attachment was not appealable.

It seems, that the application for an attachment is properly denied in such a case, and that the plaintiff, to enforce his demand to the account, should move for an order instructing the defendant that he had not complied with the requirement, and directing him to render a further account.

Appeal from an order denying a motion to issue an attachment against a defendant, for not furnishing an account.

This action, which was brought by Jonathan against Edmund Ackroyd, was for the purpose of settling the affairs of a partnership, and to have an accounting from the defendant, and payment of whatever might be found due.

The cause having been referred to a referee, and the referee having reported, among other things, that the plaintiff was entitled to a judgment for the accounting of the matters alleged in the complaint, and that it should be referred to take and

Aekroyd v. Aekroyd.

state an account; a reference was ordered for the purpose of such an accounting, and the order of reference required the defendant to produce before, and leave with the referee under oath, all the books and vouchers of the partnership, and render an account, under oath, of all the goods, property, effects and credits of the partnership, and submit to an examination before the referee in reference thereto.

The plaintiff subsequently applied to the court at special term, for an order to show cause why defendant should not be punished for contempt. He produced affidavits stating that the books produced by the defendant upon the accounting, were not sufficient to state a perfect account, and that it was in the power of the defendant to bring in a more full account. He also produced a certificate of the referee, stating, among other things, as follows: "I further certify that on the second day of April, 1866, the defendant's counsel left with me sundry account-books and vouchers, accompanied by the defendant's affidavit, a copy of which is hereto annexed, marked Schedule A; that he has not deposited or left with me any further or other papers; on the third day of April, instant, at two o'clock P. M., the plaintiff and defendant, and their respective counsels, attended before me, and the plaintiff required the defendant to render an account, as directed by that part of the order of reference, which orders the defendant to render an account under oath of all the goods, property, effects and credits of said partnership; this the defendant by his counsel declined to do, alleging that the deposit of the books and vouchers above mentioned was a compliance with that part of the order of reference requiring the defendant to render an account. The plaintiff's counsel then requested me to give a certificate that defendant had not rendered the account required by the said order of reference, and I accordingly certify that the defendant has not rendered the required account, but declined and refused to render the same."

Upon these papers the plaintiff obtained an order requiring the defendant to show cause why an attachment should not issue against him for his contempt in not furnishing the account required.

In opposition to the motion, the defendant produced his own

Ackroyd v. Ackroyd.

affidavit, alleging that the books produced by him and left with the referee contained a full and complete account of all the business transactions in question; that they were the only books ever kept, except the cash book and banker's book, neither of which were in the possession nor under the control of the defendant; that the account and books left with the referee were prepared and left under advice of counsel, and that it was not in the power of the defendant to render a more full and perfect account than he had rendered.

The motion was heard at special term in May, 1866, before BARNARD, J., and denied, with costs.

From this order the plaintiff now appealed.

Charles E. Miller, for the respondent.—I. The order made was entirely in the discretion of the court, and the appeal should be dismissed (*Abbey v. Abbey*, 6 *How. Pr.*, 340, note; *Joyce v. Holbrook*, 7 *Abb. Pr.*, 338).

II. The order should be sustained upon the merits. The court will not adjudge defendant in contempt for not doing an impossibility, nor for omitting what it is not in his power to do (*Myers v. Trimble*, 3 *E. D. Smith*, 607; *Quintard v. Secor*, *Id.*, 620). Any uncertainty as to the fact of disobedience enures to defendant's benefit, for the reason that he should not be punished as for a contempt, unless the affidavits show beyond a doubt that he disobeyed the order (*Potter v. Low*, 16 *How. Pr.*, 549). The power of the court to punish should not be exercised, unless the acts constituting the alleged contempt are clearly proved, and constitute a positive violation of the plain terms of the process or order (*Weeks v. Smith*, 3 *Abb. Pr.*, 211).

III. Plaintiff, if dissatisfied with the account, should have moved for a further account. If either of the parties is not satisfied with the account brought in, he may exhibit interrogatories to be settled by the master for the examination of the accounting party, touching such points wherein the accounts are deemed to be inaccurate or insufficient (1 *Barb. Ch. Pr.*, 507). The appellate court will not reverse decision of question of

Ackroyd v. Ackroyd.

fact upon conflicting affidavits, unless satisfied that the judgment is clearly wrong (*Chaine v. Wilson*, 1 *Bosw.*, 673).

William Tracy, for the appellant.—I. The account required by the order of reference is the ordinary debtor and creditor account, provided by rule 107 of the court of chancery (*Chancery Rules*, 1839, p. 83; *Story v. Brown*, 4 *Paige*, 112; *Ketchum v. Clark*, 22 *Barb.*, 319; 1 *Laws of 1847*, 344, § 77; 3 *Rev. Stat.*, 201, § 49; *Palmer v. Palmer*, 13 *How. Pr.*, 363; *Code*, §§ 461, 469. The account should be in the form indicated by the rules of 1839, p. 170; not the mere production of a ledger, leaving the referee to make what he can of it.

II. It is alleged, and it is not denied, that the defendant is familiar with book-keeping, and perfectly competent to state an account. It was adjudged that he had received all the property of the partnership under the agreement of 1856, and it is alleged in plaintiff's affidavit, and not denied, that besides the other property, he had handed to defendant, in December, 1856, securities, all of which he believed had been paid, to the amount of fifty-five thousand four hundred and forty-seven dollars, and forty-eight cents, and this is not denied; and that plaintiff can find no entries in the blotter, journal and ledger, of a date later than October 31, 1856, and this is not denied. With these facts, the pretence that he is unable to state an account is palpably untrue. If he cannot, from those books, who can? Can the referee?

III. The court will the certificate of the referee, verified by the affidavits, and not contradicted, that the defendant has contumaciously refused to obey the order of the court. And the whole case shows a determination by the defendant to resist its orders. Under such a state of facts, an attachment should issue (*Hoffman's Pr.*, 9, 10; 2 *Rev. Stat.*, 278, § 10 [5th ed., vol. III., p. 469, § 8]).

BY THE COURT.—SUTHERLAND, J.—I do not say that in no supposable case, or under no supposable circumstances, an order denying a motion for an attachment for disobeying an order of the court, is or would be appealable; but in my opinion in this

Ackroyd v. Ackroyd.

case, and under the circumstances shown by the papers, the granting or not granting the attachment was entirely in the discretion of the judge, and the appeal should be dismissed, upon the ground that the order denying the motion for attachment was not appealable.

Though the judge may have thought that the defendant had not in fact complied with the direction in the order of reference as to the production of books and papers, and rendering the account, or an account, yet it certainly did not follow of course that an attachment should be granted.

On the motion for the attachment the question was whether the defendant had intentionally or inexcusably disobeyed or refused to comply with the order as to the production of the books, and the rendering of the account, or of an account.

If on that motion, or on a motion made specifically for the purpose, the court had instructed the defendant that he had not complied with the order as to the production of books and the rendering of an account, and had made an order directing the defendant to render an account, so far as he could from the books, which he did, or had it in his power to produce, and a motion had been made for an attachment, on the ground that the defendant had not rendered, or attempted to make out and render, any account, the question of appealability, and on the merits, would have been quite different.

I think the appeal should be dismissed, with costs.

CLERKE, and GEO. G. BARNARD, JJ., concurred.

*Compared
38 N.Y. 172, 174.*

CLARK *against* BROOKS.

New York Common Pleas; General Term, September, 1866.

Again, November, 1866.

Court of Appeals; March Term, 1867.

NEW TRIAL.—FEIGNED ISSUE.—STAY OF PROCEEDINGS.—APPEAL FROM ORDERS AND JUDGMENTS.—CONTINUING RECEIVERSHIP OF BUSINESS.—APPEAL TO COURT OF APPEALS.

Although in actions at law a motion for a new trial is frequently determined upon strict rules, yet in a court of equity, where a trial by jury has been directed to ascertain facts for the information of the court, a new trial will not be ordered, whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or a misdirection on the part of the judge, unless the court, taking the whole of the evidence together, and connecting it with the judge's charge, think that injustice has been done by the error committed, and are dissatisfied with the verdict.

Although, in ordinary cases, the court should grant a stay of proceedings, to enable a party to review their decision by an appeal, yet, where the property in controversy includes the good-will of a business, which is continued by a receiver pending the proceedings,—*e. g.*, the publication of a newspaper,—the court will not grant a stay of the sale, after protracted litigation, without some guaranty on the part of the party asking it, against depreciation in the value of the property, pending the stay.

It seems, that in a case of an equitable nature, an application for a new trial is in the discretion of the court, and the existence of irregularities or errors upon the trial, do not, as a matter of strict right, entitle the unsuccessful party to an order for a new trial.

An order for judgment, which requires a reference and a report before a final determination of the cause, is not the subject of an appeal to the court of appeals.

An order granting or refusing a new trial is appealable to the court of appeals; but this rule does not apply to the case of a trial of special issues, which may or may not embrace the merits of the cause.

The award of such issues is a matter of practice resting in the discretion of the court.

Clark v. Brooks.

This action was brought by Stephen T. Clark against James and Erastus Brooks, for the purpose of settling a partnership alleged to have existed between the parties, who were publishers of the "New York Express."

In 1864, upon application of one of the parties, the court made an order settling certain issues in the action, to be tried by a jury. After the trial of these issues, and a finding thereon by the jury, the court, on motion of the plaintiff, upon the findings of the jury on the special issues, ordered judgment for the plaintiff. The nature of this order is more fully stated in the opinion of the court of appeals. Among other things it directed a sale of the partnership property, including the Express newspaper and business.

I. *September, 1866.* Appeal from order denying a new trial.

The defendant moved for a new trial of the issues which had been so framed and determined. This motion was denied; and on appeal the following opinions were rendered.

DALY, J.—The plaintiff brought his action for the dissolution of a co-partnership existing between himself and the defendants in The Express, a daily newspaper, and for the taking of an account, claiming that he had an interest of one-sixth. The defendants insisted that his interest was only one-sixth of two-thirds, and upon the defendants' application it was ordered that the point in dispute should be tried by a jury.

The trial was a long one, and fills a volume of more than 400 printed pages. It was exhaustive in respect to the subject-matter. Great latitude was allowed to the defendants upon the cross-examination of the plaintiff, Clarke: in the examination of their own principal witness, James Brooks, and by the admission of a large amount of testimony, much of it under the plaintiff's exception, consisting of newspaper extracts, and the evidence of many witnesses relating to the speculation of the plaintiff in stocks, and as to his management of the money article in the Express, and there was an extensive examination of the books of account and business transactions of the newspaper, extending over the whole time of Clarke's active connection with it a period of more than seven years. Strict attention

Clark v. Brooks.

was paid by the jury to the testimony, during the whole investigation. The pertinent and suggestive questions put by them, especially during the examination of the books of account, and in respect to details in the business management of the paper, exhibited so much intelligence and practical business knowledge, that I was induced in my charge to make especial reference to the attention they had shown, the intelligence manifested by their inquiries, and to say that I doubted whether a better jury could have been found for the discharge the duty imposed upon them.

Forty-one exceptions were taken by the defendants during the progress of the trial, embracing exceptions to the admission or to the rejection of testimony, or to the ruling of the court upon questions of law, but one of which is considered, in the opinion of my colleague, as a ground for granting a new trial, and that was allowed upon the settlement of the case under peculiar circumstances. No memorandum of the exception was to be found in my own notes, nor in those of any of the counsel upon either side, nor in the notes of the stenographer. It was to the admission of a declaration made by Clarke to his attorney, Mr. Bangs, which, from my familiarity with the rules of evidence, I would have supposed I could not have admitted under an exception, but for the fact that it was the impression of the two counsel for the defendants that I did, and I allowed it in deference to their better recollection. Regarding it, therefore, as testimony erroneously admitted under exception, the question arises whether the reception of it constitutes, in a case like this, a sufficient reason for ordering the cause to be tried over again.

This was an equity suit, in which the defendants were not entitled, as a matter of right, to a trial by jury, but in which the court, in the exercise of its discretion, directed certain facts to be ascertained by the verdict of a jury, and in such a case new trials are not granted with the same facility, nor in all instances, for the reasons, which would be sufficient in an action at law.

When an issue of fact is joined in an action at law the verdict of the jury, if not disturbed, is final, and the judgment of the court is given in accordance with it. For this reason it has been deemed more important that courts should upon such

Clark v. Brooks.

trials enforce the principle that the rights of parties are to be determined strictly by legal evidence; and the most effectual means of enforcing it, is to order a new trial if improper evidence is admitted against the remonstrance and objection of the party complaining. Hence, it has been held in this State that a new trial will be granted in an action at law where erroneous evidence is admitted under exception, unless it is shown that the verdict was not affected by it: that it will not suffice that the party excepting was not probably injured, but it must be shown beyond a doubt that he could not have been prejudiced by it (*Anthoine v. Coit*, 2 *Hall*, 40; *Gillet v. Mead*, 7 *Wend.*, 193; *Clark v. Vorce*, 19 *Id.*, 232; *Farmers' Bank v. Whinfield*, 24 *Id.*, 419; *Clark v. Crandall*, 3 *Barb.*, 613; *Dresser v. Ainsworth*, 9 *Id.*, 619; *Boyle v. Colman*, 13 *Id.*, 42; *Williams v. Fitch*, 18 *N. Y.*, 546; *Erben v. Lorrillard*, 19 *Id.*, 299).

This in most cases it is difficult to show, as it is generally impossible to say what effect the evidence may or may not have had upon the minds of the jury, and it is for this reason that it has been held that the proper course in such a case is to grant a new trial (*Marquand v. Webb*, 16 *Johns.*, 89; *Osgood v. Manhattan Co.*, 3 *Cow.*, 612). But even upon this point the authorities in this State are by no means harmonious, for it has also been held that though such evidence was objected to, a new trial would be denied, unless there should be strong probable grounds for believing the merits had not been fully and fairly tried, and that injustice had been done (*Crary v. Sprague*, 12 *Wend.*, 41; *Northrop v. Wright*, 24 *Wend.*, 223; *Depeyster v. Columbia Insurance Co.*, 2 *Cai.*, 90); and Judge WRIGHT in *Forrest v. Forrest*, 25 *N. Y.*, 510, says that it is hardly the rule now in courts of law that a new trial must be granted because evidence was received, that ought to have been rejected, for that "latterly even these courts undertake to judge for themselves as to the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial." The same want of agreement exists in the English courts. In the Common Pleas a new trial will not be granted for the admission of improper testimony if there is enough evidence in the case to

Clark v. Brooks.

warrant the verdict, and if in their judgment, the evidence improperly admitted ought to have had no effect (*Doe v. Tyler*, 6 *Bing.*, 561; *Horford v. Wilson*, 1 *Taunt.*, 14; *Nathan v. Buckland*, 2 *Moore*, 153). While the king's bench has refused after mature consideration, to follow the rule of the Common Pleas, and declare that they will not undertake to determine such a question, as they cannot say what effect the evidence may have had upon the minds of the jury, and that if they refused to grant a new trial where inadmissible evidence has been received under exception, that it might cause the rules of evidence upon trials, to be less carefully considered (*Crease v. Barrett*, 5 *Tyrrwh.*, 475; *De Rutzen v. Farr*, 4 *Ad. & E.*, 53). The rule of the king's bench has hitherto been the prevailing one in this State, while in most of the other States of the Union, the rule of the Common Pleas, after a full examination of the subject, has been adopted as the one which the result of experience has shown to be the best adapted for the attainment of justice (*Hamblett v. Hamblett*, 6 *N. H.*, 333; *Deerfield v. Northwood*, 10 *Id.*, 269; *Prince v. Shepard*, 9 *Pick.*, 176; *Thompson v. Lothrop*, 21 *Id.*, 536; *Thorndike v. Boston*, 1 *Metc.*, 242; *Page v. Homans*, 2 *Shep.*, 478; *Commonwealth v. Shepherd*, 6 *Binney*, 283; *Steelman v. Steelman*, 1 *Harr. N. J.*, 66; *Barringer v. Nesbit*, 1 *Smedes & M.*, 22; *Carrol v. Mays*, 8 *Dana*, 178).

But the strict rule which has been applied in courts of law has never been recognized in courts of equity. Where a trial by jury has been directed in a suit in equity to ascertain certain facts, the trial is simply for the information of the court, with whom the ultimate decision of the case rests, and it is not therefore necessarily conclusive. The court, says Mr. GRESLEY in his work upon equity evidence, "may, if it think fit, make no use of the verdict, but treat it as a nullity. It will often pay no heed to the most flagrant misdirection on the part of the judge, or mistakes as to the admission of evidence, if the court is satisfied that the verdict is as it ought to have been, upon the evidence which is sound, and it may either send the case back to another jury or decide it even in the teeth of a verdict" (*Gresley upon Evidence in Court of Equity*, p. 527, 528). Although a court of equity would have been satisfied if the verdict had been the reverse of what it is, it will not for that rea-

son, send the case back for another trial. There must be something which shows that the verdict is clearly wrong; something which satisfies the court that it cannot be right (*Northam Bridge & Road Co. v London & Southampton Railw. Co.*, 11 *Simons*, 42). The test in every case is the satisfaction of the conscience of the court, and this standard, as Mr. GRESLEY has remarked, being itself so vague, the rules in equity for granting a new trial are necessarily indefinite. The only general rule to be obtained from an examination of the cases is, that whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or misdirection on the part of the judge, another trial will not be ordered, unless the court, taking the whole of the evidence together and connecting it with the judge's charge, thinks that injustice has been done by the error committed, and it is dissatisfied with the verdict (*Head v. Head*, 1 *Turn. & Russ.*, 141; *Barker v. Ray*, 2 *Russ.*, 63; *Winchilsea v. Wanchope*, 3 *Id.*, 446, 454; *Slaney v. Wade*, 7 *Sim.*, 595; *Northam Bridge Co. v. London & Southampton Railway Co.*, 11 *Id.*, 42; *O'Connor v. Cook*, 8 *Ves.*, 532; *Warden of St. Paul's v. Morris*, 9 *Id.*, 165, 169; *Pemberton v. Pemberton*, 11 *Id.*, 52; *Boole v. Blundell*, 19 *Id.*, 503; *Bateman v. Willoe*, 1 *Sch. & Lef.*, 201; *Tatham v. Wright*, 2 *Rus. & Myl.*, 1; *Apthorp v. Comstock*, 2 *Paige*, 482; *Mulock v. Mulock*, 1 *Edw. C.*, 18; *Paterson v. Ackerson*, *Id.*, 96; *Lansing v. Russell*, 13 *Barb.*, 520; *Trenton Banking Co. v. Rossell*, 1 *Green Ch.*, 511; *Lyles v. Lyles*, 1 *Hill's Ch.*, 76; *Gilman v. Cameron*, 1 *Geo. Decis.*, 142; *Clayton v. Yarrington*, 33 *Barb.*, 146; *Forrest v. Forrest*, 25 *N. Y.*, 512).

Applying this rule to the present case, there is no ground for a new trial, as all that was given in evidence, by proving what Clarke said to his attorney, Mr. Bangs, was substantially established afterward in every material particular by the testimony of James Brooks himself; so that the evidence could have had no injurious effect upon the result, or operated in any way prejudicially to the defendants. This is even the rule in courts of law, in which a new trial will not be granted if facts are clearly proved by competent testimony and the jury have found in accordance with them; though, in a certain stage of the case, improper evidence may have been

Clark v. Brooks.

admitted, establishing, or tending to prove, the same facts (Mayor v. Wittberger, *Geo. Dec., Part II.*, 20; Prince v. Shepard, 9 *Pick.*, 176; Thompson v. Lothrop, 21 *Id.*, 336; Emmons v. Lord, 6 *Shep.*, 351; Hutchinson v. Moody, *Id.*, 393; Bunting v. Allen, 3 *Harr. N. J.*, 299; Steelman v. Steelman, 1 *Id.*, 66; Barringer v. Nesbitt, 1 *Smedes & M.*, 22).

The plaintiff, to show that his interest was that of one-sixth, relied upon a written paper, Exhibit C, signed by James Brooks, in which it is declared that he was the owner of two-thirds of the Express, and that he agreed, on the 1st of January, 1856, to sell to the plaintiff one-sixth of his interest in the paper, thereby reducing his own interest to one-half, for the sum of thirteen thousand three hundred and thirty-three dollars and thirty-three cents, two thousand five hundred dollars of which was to be paid on the delivery of this memorandum, and which two thousand five hundred dollars James Brooks admitted that he had received. This memorandum of an agreement thereafter to be executed was dated the 30th of Nov., 1856, and it would have been conclusive upon the point in dispute, but for the fact of the existence of another paper, bearing the same date, a copy of which the plaintiff served with his complaint, which was signed by James Brooks, and which transfers to the plaintiff one-sixth part of James Brooks's interest in the paper, which is declared by it to be two-thirds of the whole.

It lay with the plaintiff to account for the conflict between these two instruments, by one of which one-sixth of the whole was to be unused, and by the other one-sixth of two-thirds was transferred, both being of the same date. The plaintiff testified that after making up the account in January, 1860, he told James Brooks that he wanted something more than the first memorandum, and suggested that there should be a formal bill of sale, and that he would give Brooks a chattel mortgage, securing him for the balance which was due him, and to which Brooks assented; that accordingly he went to his lawyer, Mr. Bangs, to get the mortgage and a legal bill of sale for James Brooks drawn, to be executed in place of what he regarded as an informal memorandum; that he gave Bangs the memorandum, Exhibit C, and instructed him as to what he wanted; that Bangs drew a paper, as the plaintiff supposed, in

Clark v. Brooks.

accordance with the memorandum and with the instructions that had been given ; that Bangs gave him the paper, and he gave it to Brooks, and told him it was the bill of sale that Bangs had drawn, and asked him to examine it ; that Bangs returned it to him in a few days, and that he kept it in his desk for three years, not being able to get it executed ; that at the end of that time, having paid up the residue of the purchase money, he desired to have formal articles of co-partnership executed, which was agreed to by the defendants, and that in December, 1862, he went to another lawyer, Mr. Lawton, and employed him to draw the articles, at the same time giving him the paper which Bangs had prepared without examining it, and requested him to make a copy of it, that it might be executed ; that he received the draft of the articles of co-partnership and the copy of the bill of sale, and on the 30th of January, 1863, the articles were signed by himself and James and Erastus Brooks, and the bill of sale was executed by James Brooks and witnessed by Erastus Brooks. This bill of sale (Exhibit A) is the one already referred to as transferring only one-sixth of two-thirds: It was shown to have been copied by Lawton's clerks from another paper, but the clerk could not say from whom he had received the original paper. The articles of co-partnership, which took effect from their date, the 17th of January, 1863, declare that the plaintiff and James and Erastus Brooks are the owners of the Express—James Brooks of the one-half, Erastus of one-sixth and the plaintiff of one-sixth—and that as such owners and proprietors they had thereupon published the Express under the name of J. & E. Brooks, and that they had for the purpose of continuing the paper and carrying on the business establishment thereof, agreed to become co-partners under the name of J. & E. Brooks & Co. The plaintiff also testified that the paper prepared by Bangs, the original of Exhibit A, was destroyed by him, together with an unexecuted mortgage prepared by Bangs, upon clearing out the papers from his desk, some time between the execution of the articles of copartnership and the commencement of the suit, that is, between the 30th of January and the 17th of July, 1863 ; that he destroyed them with other papers, supposing them to be of no further use, and that he never discovered that Exhibit A was different from Exhibit

Clark v. Brooks.

C until his attention was called to it after the commencement of the suit; that he supposed the mortgage was the same as Exhibit A, upon the supposition that if Bangs made a mistake in the one he continued it in the other.

The plaintiff then called Bangs. He remembered the plaintiff calling upon him, but could recollect only one interview. He was asked what transpired, to which the defendant objected. The objection was overruled, and the defendant excepted. The witness then stated that the plaintiff brought him a paper and was about to state what occurred between the plaintiff and himself, when the defendant objected. The objection was overruled, and the defendant excepted. Bangs then testified that the plaintiff exhibited to him the paper, as containing the terms of arrangement for the purchase by him of an interest in the Express. That he could only state the substance of the instructions he had received. That they were substantially that the paper brought by the plaintiff had been in existence for some time, and that nothing had been executed to carry it out; that the plaintiff wanted a paper executed to carry out the one shown by him to the witness, and that his instructions were to draw such a paper. That Clark said something about the property of the Express consisting of subscription lists, type, &c., and that they agreed that the larger part of the property of a newspaper establishment was somewhat indefinite. This was the whole of the evidence of what the plaintiff said to Bangs, and for the admission of which the defendant asks to have a new trial. Bangs further said, upon the direct, that he drew a paper for the plaintiff, but he had no recollection of delivering it to any one, although he had no doubt that he did. That he recollected that the paper shown to him by the plaintiff was a blue one, and a short one, but he did not remember its contents. But this latter evidence, even if it had been excepted to, was admissible, the question being how the two conflicting papers, of the same date, came to be executed.

The witness was cross-examined by the defendants, and the result of it was this: That he tried to be a careful man in drawing papers, but he had made mistakes. Would not say that he had not in this instance, for he did not know. It was always a rule with him to read a paper to a party after it was

Clark v. Brooks.

drafted, to see if it expressed what the party meant; but he had a doubt whether he had read the paper he prepared in this instance to the plaintiff, as he had no recollection of delivering it. He had not the slightest recollection of the details of it. Exhibit C he did not recognize, nor Exhibit A, but he may have seen it. He then read both papers, and said that he had drafted a paper like Exhibit A; that, as nearly as he could recollect, the paper he drew corresponded in substance with Exhibit A; that he prepared a paper which, according to his recollection of its contents, corresponded substantially with Exhibit A; that it was his impression that the paper which the plaintiff showed him was not left with him; that his recollection was that he became acquainted with its contents, and then drafted the paper which he drew.

The substance, then, of the witness's testimony, was that the plaintiff had brought a paper to him, of the details of which he had not the slightest recollection, and that he drew a paper from it for the plaintiff, the contents of which, to the best of his recollection, corresponded with Exhibit A. So far, therefore, as his general testimony went, it was as favorable for the defendant as for the plaintiff.

James Brooks testified that about the time referred to by Bangs, a paper corresponding with Exhibit A was brought to him, together with a chattel mortgage, by the plaintiff; that he told the plaintiff that there was no use in his giving a chattel mortgage, that they could get along amicably; that he (the plaintiff) was paying the purchase money, and would pay it in due time, and he would have his conveyance in legal time; that they were trusting each other, and that he (Brooks) did not see any necessity for drawing papers in a legal form, because they could get along as partners, so that the fact of the preparation and existence of these papers was established also by the testimony of Brooks. He also proved that the paper under which they were doing business when this interview occurred with Bangs, had been in existence for some time, and that nothing had been executed to carry it out until January, 1862. He said it was signed by him in January, 1856. That it was a memorandum of the arrangement made in these words: "I will sell and convey to Clark one-sixth of my two-thirds interest, giving him the assets for his share." That it

was the proposition contained in Exhibit A, so that for all that appears from this portion of the testimony of Bangs, this may as well have been the paper which the plaintiffs brought to Bangs, and to which he referred, as Exhibit C. Bangs did not swear that the paper brought to him was Exhibit C, for he had not the slightest recollection of its contents, nor did this inadmissible testimony in any way tend to prove it so, nor did it in any way conflict with or contradict the testimony of Brooks. It could, therefore, in no way have operated to the prejudice of the defendants. What was said about the property of the Express consisting of subscription lists, types, &c., and of the indefinite character of such property, was entirely immaterial, and had no bearing upon any question involved in the case.

Two facts in the testimony of Bangs, one of which was admissible even if it had been excepted to, and the other of which was brought out by the defendants upon the cross-examination of the witness, may have had an influence upon the jury. He testified that the paper brought to him was of a blue color, in this respect corresponding with Exhibit C, and that it was his impression that the paper was not left with him; that he became acquainted with its contents, and then drew the paper which was the original of Exhibit A. The jury may possibly from this circumstance, have inferred that Bangs, not having Exhibit C before him, and remembering that the interest of James Brooks was two-thirds, and that the sale was to be made by him, may, by mistake, have drawn the bill of sale and the mortgage for one-sixth of two-thirds only. These two facts, I say, may, in connection with other testimony in the case, have led the jury to that conclusion, but every other part of Bangs' testimony was as favorable to the defendants as to the plaintiff, or if it had any tendency either way, it was toward producing the impression that the paper brought to him stated the plaintiff's interest to be as it was expressed in the original of Exhibit A.

This will suffice to show that the reception of this testimony had no injurious effects upon the defendants. The same general remark may be applied to the other exceptions. They are too numerous to go over in detail, and I will advert only to those which are contained in the appellant's points. The ques-

Clark v. Brooks.

tions put to Bangs, folios 515, 517, as to what he would have done in the cases suggested, were inadmissible, as calling for the opinions and conjectures of the witness. The issues to be tried were framed by the questions. Any pertinent evidence was admissible under them, and upon the trial of them the court had nothing to do with amending the pleadings. Exhibit C was admissible as documentary evidence directly bearing upon a fact involved in the issues. The manner in which Clark's interest was to be paid for was immaterial, the question being what his interest was. The exception at folio 1,195, referred to in defendants' point, was taken by the plaintiff. The witness afterward testified fully as to the conditions which were inquired about by the question put at folio 710, and the same remark applies to the next question, folio 711. The question at folio 1,079 was unnecessary and unintentional, as Exhibit I showed where the profits for the first six months came from, by deducting the expenses during that period from the receipts, and they were specifically stated in the figures in the Exhibit. There was conflicting evidence upon the question whether the plaintiff used the character and credit of the newspaper in private trade and business. The plaintiff testified that he did not write the money article referred to by General Dix, and he denied that he ever made the statement sworn to by Crockerott Lawrence Cohen, and it was therefore for the jury to judge of the question of relative credibility, and their finding upon the point is conclusive; and upon the other branch of the question there was no evidence sufficiently certain to warrant a finding that the partnership was deprived of any of the skill, time, and attention, of the plaintiff by his speculating in stock. The appellant's points state that all of the exceptions to the charge of the court are well taken. They are not pointed out, and I find none, in my judgment, that were well taken. This embraces a review of all the exceptions relied upon or stated in the defendants' points, and I will now add that I heard the evidence in this case; that since the argument I have read the whole of it carefully over, and collated and compared different parts of it, and my conclusion is that the weight of the testimony is in favor of the verdict.

CARDOZO, J.—I have read the voluminous case in this matter very many times, but in the view I take of it, it will not be

Clark v. Brooks.

necessary for me to allude, to any considerable extent, to the testimony.

It is a singular case in many respects.

The main point of dispute was whether the plaintiff was the owner of one-sixth of the whole, or but one-sixth of two-thirds of the newspaper called the Express. Attached to the plaintiff's complaint were two papers, inconsistent with each other, by one of which the smaller interest was conveyed to the plaintiff, and by the other of which it was recited that he was entitled to the larger. Upon the part of the plaintiff, it was claimed by a paper dated the thirtieth day of November, 1855, it was agreed that there should be sold to him one-sixth of the whole concern; and that the instrument of the same date conveying to him but one-sixth of two-thirds was designed to fulfill that agreement, and was accidentally erroneously drawn. The defendants insisted that the writing agreeing to sell to Mr. Clark one-sixth of the whole property, was but one of three propositions, all drafted in the form of agreements to sell, signed by Mr. James Brooks, and left with Mr. Clark for consideration, and that that proposition was rejected by Mr. Clark, and one of the others, by which he was to have one-sixth of two-thirds, precisely as specified in the conveyance of November 30, 1855, was accepted by him. The inconsistency exhibited at the start of the cause—by the conflict between the two papers appended to the complaint—continued throughout it in almost every stage, including the trial of the issues, upon which the two highly reputable gentlemen, plaintiff and defendant, who are the principal actors in the suit, flatly contradicted each other in almost every material and leading point. Mr. Brooks' evidence that he had such confidence in Mr. Clark that he signed almost anything that the latter presented to him without reading it, and the theory of having no taste for accounts (which is sustained by Mr. Clark's oath, that when all the partners met at Mr. Brooks' house on Fifth Avenue, he went asleep over them) he did not comprehend or acquiesce in those which Mr. Clark says Mr. Brooks received during the partnership, are not more improbable nor more open to remark than the statement of Mr. Clark that he received from Mr. Bangs a paper which conveyed to him but one-sixth of two-thirds of the property, when he designed and had instructed

Clark v. Brooks.

the lawyer to make it a bill of sale of one-sixth of the whole; that he read it, kept it in his possession for years, and yet never detected that it varied in that important point from the real agreement and intention, until after the commencement of this litigation. But I do not intend to go through the case to specify the contradictions, or to consider which of the theories of these gentlemen strikes my mind as the more probable or consistent with the circumstances and the evidence generally.

It will readily be perceived that the conflict was great and irreconcilable, and that, from the nature of the question, any evidence which would corroborate the theory or testimony of the one side would be likely to be important and effective in deciding the issue against the other, and if any such has been improperly allowed, even conceiving that the doctrine of Forrest against Forrest, which is nothing but a reaffirmation of the old rule in chancery, is to be applicable to all equity trials, it seems impossible to say that when the question was one of credibility, the erroneous admission of testimony calculated to sustain one side has not "produced injustice in the general result" to the other.

Applying that test—whether the erroneous testimony produced injustice in the general result to the defendants in the case before us—I think a new trial should be allowed because of the ruling upon the objection to the evidence upon Mr. Bangs, as to statements made to him by Mr. Clark, the plaintiff, in the absence of the defendants. It was mere hearsay, and I see no principle upon which it should have been received. It is to be observed, also, that Mr. Clark, when on the stand, testified about his going to Mr. Bangs, and about the bill of sale being drawn by the latter, but he was not examined as to what he said to Mr. Bangs, when the defendants could have cross-examined him upon its truthfulness; yet Mr. Bangs was permitted, under exceptions, to tell the substance of what Mr. Clark said to him. I think this, tending as it did to sustain and corroborate Mr. Clark's version, or at least his recollection, in an essential particular, may easily, on a nice question of credibility, have turned the jury against the defendants, and that for that reason, especially as the verdict necessarily seriously reflects upon the witness whose evidence must have been disregarded, we ought not critically to review the testimony, to

Clark v. Brooks.

see whether the finding of the jury is not so consistent with many circumstances as to require us to pronounce it satisfactory, but seeing that the evidence erroneously received may have influenced the jury to believe Mr. Clark and to discredit Mr. Brooks, and recognizing that a question of credibility is essentially one proper to be submitted to "men accustomed to examine facts in the light in which people generally view them, rather than in the close method of judges and lawyers,"—we ought to say that the error may "have done injury" to the defendants, and may "have produced injustice in the general result" (*Forrest v. Forrest*, 25 *N. Y.*, 512), and that, therefore, the verdict should be set aside, and a new trial ordered.

II. *November*, 1866. Motion for stay of proceedings.

The defendant, pending his appeal from the order denying a new trial made as above stated, applied to the court for a stay of proceedings until such appeal could be heard and determined in the court of appeals.

—, for the motion.

Henry A. Cram, opposed.

BY THE COURT.—DALY, J.—The undertaking required by section 334 of the Code would not stay proceedings, for the reason that the cases provided for in section 342 are cases in which a judgment is appealed from; and it has consequently been held that that section does not apply to an appeal from an order granting or refusing a new trial (*McMahon v. Allen*, 22 *How.*, 193; *Valton v. The National Loan Fund Life Assurance Society*, 19 *Id.*, 513; *Tiers v. Carnahan*, 3 *Abb.*, 69).

The rule laid down in *Tompkins v. Hyatt*, 19 *N. Y.*, 534; *Hollister Bank of Buffalo v. Vail*, 15 *Id.*; *Swartwout v. Curtis*, 4 *Id.*, 415, that there must be a final judgment before an appeal can be taken to the court of appeals, does not, in my opinion, apply where the appeal is from an order granting or refusing a new trial. The amendment of the eleventh section of the Code in 1857, and 1862, allow an appeal in such a case, with no other limitation or restriction than that which is im-

posed in the case of an appeal from an order granting a new trial. The three cases above cited were not appeals from an order either granting or refusing a new trial; and as I understand the decision of the court of appeals, it was simply that that court will not review a judgment until it is actually entered, and is in all respects final in its character, which is something very different from hearing an appeal from an order granting or refusing a new trial.

It was held by the court of appeals (in *Lansing v. Russell*, 2 *N. Y.*, 563), that the granting or refusing a new trial, in an equity case, where certain issues were directed to be tried by a jury, was a matter resting entirely in the discretion of the court below, and that no appeal would lie to the court of appeals in such a case. The merits of the controversy had not been disposed of when the appeal in this case was brought; and Chief-Justice BRONSON, in delivering the opinion of the court, said that whether the order refusing the new trial could be considered, after there had been a decree upon the merits of the controversy, was a point that need not at that time be settled.

The court of appeals did, in an appeal after final judgment, review an order refusing a new trial in an equity case (in *Forrest v. Forrest*, 25 *N. Y.*, 501), in which case they affirmed the judgment; but express authority is given to that court, upon an appeal from a judgment, to review any intermediate order involving the merits, and this was such an order. All the judges in that case concurred in the opinion that where a trial by jury had been ordered in an equity case, it was to be reviewed not as upon a strict bill of exceptions, but upon the principles on which a court of equity examined the trial of a feigned issue awarded for the information of its own conscience.

Justice WRIGHT, by whom the opinion of the court was delivered, declared that the application for a new trial was in the discretion of the equity judge; that it was not material whether evidence was improperly admitted or rejected; and that a court of equity was not bound to award a new trial unless the errors were so substantial as to lead to the conclusion that the trial had been an unfair one, or that injustice had been done; which was the rule upon which this court acted in refusing a new trial in the present case. Justice WRIGHT, however, remarked further, that the discretion with which an equity

Clark v. Brooks.

court was clothed was not an arbitrary one, and that if the error committed plainly led to injurious and unjust effects, of which the defendant has a right to complain, and there was reasonable doubt of the justice of the result, a re-trial of the issues should be ordered. This, I apprehend, applies where a court of equity gives judgment in accordance with the finding of the jury, regarding it as satisfactory, and treating it as conclusive upon the questions at issue; but, as was said by Chief-Justice BRONSON (in *Lansing v. Russell*, *supra*), and as had been held in other cases, the court may decree in accordance with the verdict, or it may disregard the finding of the jury, and decree the other way; that, in short, as Chief-Justice BRONSON said, "the jury and the verdict are things which the court may use or let alone as it sees good;" and the use which the court has made of the verdict does not come under review until an appeal is taken from its judgment.

In the present question the jury passed upon the real question at issue upon the pleadings, and the court has made a decree upon the merits, in accordance with their finding, so that it is an open question whether the defendant must wait until they appeal from the judgment before they can have a review in the court of appeals of the order refusing a new trial, or whether they can review it under the appeal allowed by the amendment of 1862. If it is reviewable only as an order involving the merits, upon an appeal after final judgment is entered, then the judgment may be practically carried into effect and executed before such an appeal can be brought. It is possible, therefore, that the court of appeals may conclude that they can review the decision of the general term refusing to grant a new trial upon an appeal from the order, irrespective of the judgment, and as that is at least possible, the question is, whether we should stay all proceedings until the order can be reviewed in the court of appeals.

If nothing further were involved than the review of our order, and if the plaintiff could be secured against all the consequences of the delay, we should not hesitate to grant the application. If the suit involved nothing more than the recovery of a certain sum of money, a stay might be granted upon giving security for its ultimate payment. But the difficulty in the present case is, that the appeal, if it should be entertained by the

court of appeals, cannot be heard in its regular order, short of two or three years, and there is no means, at least none that occurs to Judge BRADY or myself, with whom I have consulted as the application was made in the first instance to him, by which the plaintiff could be secured from the consequences, if the property should in the meantime depreciate. It is a species of property, the proprietorship in a daily newspaper, which may be affected by a great variety of causes, for the pecuniary value of a newspaper depends upon its popularity and the amount of patronage it receives. The proportional part of the joint interest to which the plaintiff is entitled has been determined by the verdict of the jury and by the decree which the court has made in accordance with it; but the value of the joint interest is not known, and cannot be known until the property has been disposed of by a public sale, and what the plaintiff will be entitled to will be his proportional part of the proceeds after the property has been sold. If it should diminish in value, his share will be proportionately diminished, and in property of this nature such a possibility is a matter which cannot be overlooked.

It has been settled by a course of judicial decisions that if, in an action for the dissolution of a co-partnership, the parties cannot agree as to the value of their pecuniary interest, the only mode of determining it is by a sale of the whole of the partnership property at public auction, and this must take place sooner or later in this case, for the only point in dispute is the extent of the plaintiff's interest. It was held by Justice HOFFMAN, in *Dayton v. Wilkes* (17 *How.*, 510), that the full protection of the property in a newspaper requires that the receiver should be empowered to carry it on until sufficient time is allowed to dispose of it advantageously; and Chancellor WALWORTH held (in *Martin v. Van Shaick*, 4 *Paige*, 480), that a court of equity will not take upon itself the responsibility of continuing the publication of a political newspaper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property; that if a receiver is appointed, he must proceed and sell the establishment without delay; that in the meantime the business must be carried on by him as usual, so that the good will of it may be secured to the pur-

Clark v. Brooks.

chaser, and the full value of it realized by the partner, on the sale.

We have gone much further than this by continuing the publication of the paper through the instrumentality of a receiver, during the litigation of this court, a period now of nearly three years and a half, and the reasons must be very grave ones which would warrant us in staying the sale now that the plaintiff has obtained a decree in his favor, the defendants having failed to establish any of the defenses which they had interposed. We refused a new trial, on the very ground upon which, the court of appeals say (in *Forrest v. Forrest, supra*), a court of equity ought to refuse it, giving to the case a most careful consideration, and setting forth, in an elaborate opinion, the authorities and the reasons which in the judgment of the majority of the court were conclusive upon the point. We do not presume upon the infallibility of our own judgment. It is our duty to afford every reasonable facility to enable the defendants to review our judgment in a higher tribunal, when we can do so without prejudice to the rights of the other party ; but no security which the defendants can offer, in the shape of the ordinary written undertaking, would guard against the result to the plaintiff of a diminution in the pecuniary value of the paper, during the long period which must elapse, before the appeal from the order refusing a new trial can be heard in the court of appeals. If we should stay the sale until the appeal is disposed of, the value of the plaintiff's interest would depend upon the value of the paper then, and we have no right by an arbitrary exercise of power to subject him to the chances of such a contingency. It is admitted in the pleadings that the plaintiff was a partner, and that the partnership was dissolved in the mode prescribed by the articles ; and such being the fact, he is entitled, upon the authority of adjudged cases, to have the joint property sold at the earliest period that it can be done advantageously, whatever may be the subsequent adjudication of the court upon the distribution of the proceeds.

We can see no way in which the plaintiff can be protected against the possibility of a diminution in the value of the property, unless the defendant should agree that his valuation of his interest upon the trial should be deducted from the pro-

Clark v. Brooks.

ceeds, in the event of the orders of the general term being affirmed, and should be guaranteed by the giving of proper security. We do not impose any such condition, or say that the defendants ought to agree to it. All that we do say is, that we should not be justified in staying the sale any longer, unless the plaintiff can be secured in some way against the possibility of a diminution in the value of his interest; and unless something of this kind can be suggested, the motion for a stay must be denied.

In the views above expressed, Judge BRADY concurs.

III. *March, 1867.* Appeal to the court of appeals from order denying new trial of issues, and from interlocutory judgment.

The plaintiff brought on the cause generally at a special term in 1865, for a hearing. Interlocutory proceedings for sale of the property, and a reference to determine relative interests of the parties, was ordered.

The facts relating to the judgment appealed from sufficiently appear in the opinion of the court.

Henry A. Cram, moved to dismiss the appeal.

F. Kernan and *George H. Reynolds*, opposed.

BY THE COURT.—HUNT, J.—This action was brought for the purpose of closing the affairs of a partnership alleged to exist between the plaintiff and the defendants in the publication of the newspaper called the New York Express.

During the year 1864 an application was made and granted for the settlement of certain issues to be tried by a jury. After the trial of such issues by the jury, the plaintiff brought on the cause generally for a hearing and trial at special term, held in February, 1865, and moved for judgment on the findings of the jury. The motion of the plaintiff for judgment was granted, and the judgment order declared the rights of the parties to the subject-matter of the partnership. It further directed a sale of the Express establishment under the direction of a

Clark v. Brooks.

referee named, and ordered the referee to take and state an account of the partnership dealings and transactions. It also directed the payment of partnership debts, of costs and expenses; that the referee file his report; and the question of the plaintiff's costs was reserved until the coming in of the report of the referee. This order also recited an order for the special term, made February 8, 1865, denying a motion for a new trial of the issues submitted to the jury, founded upon a case containing the pleadings, the issues, the testimony, the findings of the jury, and exceptions. The order thus recited is not itself among the papers before us. The appeal to the general term from this latter order, and from the judgment order of February 21, 1865, were apparently heard in one motion, and denied in one order on the twenty-ninth day of September, 1866. From this order an appeal was taken to this court by the defendants, and the plaintiff now moves to dismiss the same, on the ground that no appeal will lie from such order.

The judgment order of February 21, 1865, is not an appealable order. It is not a judgment of which a record has been made and filed; but an order for judgment simply. Considering it, however, as a judgment, it is not a final judgment, but interlocutory merely; and no appeal from a judgment as such lies to this court, except where the judgment is final. When the report of the referee shall have been made, and judgment entered therefor, additional questions may arise upon which the judgment of the special and the general term may be needed, and from which an appeal may be taken to this court. When it shall be thus brought up, the judgment will be final, and one appeal to this court will embrace all the questions thus presented, or that may be embraced in any previous order affecting the merits of the case. It is not the practice to allow a case to come to this court upon a fragmentary trial by instalments, and in different forms. It can come once only, and in one form, when the merits are to be investigated. Until the conclusion of the reference, and the entry of final judgment upon it, no appeal can be brought to this court (*Tompkins v. Hyatt*, 19 *N. Y.*, 534; *Holston Bank v. Vail*, 15 *Id.*, 593). It was stated upon the argument that a contrary decision had been made in *Stevens v. The Buffalo, Corning & New York R. R. Co.*, not reported. I am satisfied that this is an error.

Clark v. Brooks.

The affidavits in that case showed that an appeal was pending upon a final judgment subsequently made in the case, and the motion to dismiss was denied, probably upon the ground that the first appeal was practically waived, and that a motion to dismiss the same was not justified, or it might have been denied upon the ground that the judgment became final after the reference had been had and the report of the referee confirmed by the court (4 *Comst.*, 415). The opposing affidavits are not on file with the clerk of this court. Upon consultation with my brethren, they concur in the opinion that the rule is as I have stated it above, and that if any case has been decided differently, it has been done inadvertently, or without due consideration.*

It is supposed however, that a different rule prevails where a motion for a new trial is denied, and that the existence of the order of February 8, 1865, denying a motion on the part of the defendants for a new trial upon the issues settled, when the denial was affirmed in the order of the general term of September 29, 1866, makes such order appealable to this court.

The section of the Code of Procedure cited by the appellants plainly authorizes an appeal from an order granting or refusing a new trial, in the case of a trial occurring in the ordinary course of practice, and where a judgment has been entered. But there was no trial of this action on the occasion suggested. That trial took place afterwards, on the twenty-first day of February, 1865, and the whole case was never before the court till that day. There had been a previous trial of certain questions in the case, the determination of which it was supposed would aid the court in ascertaining the merits of the case, when the trial itself should come on. It was a trial of the precise written questions submitted to the jury, and of nothing else. By the established practice those questions might embrace the merits of the case generally, or they might be limited to any portion of it. Such a proceeding is not a trial of the action, but an examination of the particular questions submitted only; at a subsequent time the action itself must be brought on for trial, when these preliminary proceedings are submitted to the court as a part of the proceedings in the case. An award of a feigned issue, under the former practice in chan-

* Compare *Smith v. Lewis*, 1 *Daly*, 452.

Maretzek v. Cauldwell.

cery, or the framing of issues, as now practiced, is a proceeding simply to inform the conscience and judgment of the court before which the trial is had. The court to which the result is presented on the trial of the action is authorized to bestow upon it just that degree of attention to which it is entitled. It may rely upon it as satisfactory and conclusive. It may accept it in part, rejecting other parts. It may discard it entirely (*Lansing v. Russell*, 2 *N. Y.* [2 *Comst.*], 563; *Candee v. Lord*, 2 *Id.*, 269). An award of issues is a matter of practice, and may be granted or refused in the discretion of the court. The granting of a new trial after a verdict upon a feigned issue was in the discretion of the chancellor, and not the subject of an appeal. If the result was right he accepted it, although errors might have intervened in reaching it. Such is the settled practice also in regard to verdicts upon issues settled (*Code of Pro.*, § 72; *Forrest v. Forrest*, 25 *N. Y.*, 501, where the whole subject is elaborately discussed by Judge WRIGHT; see also *Clapp v. Fullerton*, 34 *N. Y.*, 190; *Schenck v. Dart*, 22 *Id.*, 420). The order is interlocutory, and not the subject of an appeal to this court, and it derives no additional authority from being connected with an order of the special term, denying a motion for a new trial of certain issues framed and settled in the manner I have mentioned.

Appeal dismissed.

MARETZEK against CAULDWELL.

New York Superior Court; Special Term, April, 1867.

NEW TRIAL.—CHALLENGE OF JURORS.

In an action for damages for a libel, respecting the plaintiff's conduct in the management of theatrical representations, the fact that a juror declares himself opposed to theatrical representations, is not a ground of challenge for principal cause.

Such an opinion does not amount to incompetency, and is therefore only a ground of challenge to the favor.

17 Reviewed
of Blatchford (N.Y.)
583

Maretzek v. Cauldwell.

Motion for a new trial.

This action was brought by Max Maretzek, the manager of an opera in the city of New York, against the defendants, William Cauldwell and Horace P. Whitney, publishers, editors, and proprietors of *The Sunday Mercury*, a weekly paper published in the city, to recover damages for two articles printed therein in October, 1863. The first article was headed, "The Disgrace of the Opera," and it described the opera of the plaintiff as being frequented by vicious and immoral persons, and being such an exhibition as respectable women could not patronize. The second article, which was set forth as a second cause of action, was entitled, "The Academy of Music under a Cloud—Sin in High Places," and this article made the same charges with more particularity.

The proceedings in this case upon demurrer to the answer are reported in 19 *Abb. Pr. O. S.*, 35, where the facts at issue are fully stated.

The cause was tried at a trial term of the court, at which, upon the impannelling of the jury, the plaintiffs challenged a juror named Meyer, on the ground of bias and incompetency, because of alleged fixed opinion, amounting in law to a conclusion upon the matters in issue in the case. The expression of opinion upon which this objection was founded was the statement of the juror that he was opposed to theatrical representations.

The juror was excluded by the court, and, upon the trial subsequently had, the jury rendered a verdict of \$1,000 against the defendants.

A. Oakey Hall, for the defendants,—moved for a new trial on the ground above stated, among others which he adduced.

S. B. H. Judah, for the plaintiff, opposed.

ROBERTSON, Ch. J.—If the case on which this motion was heard be correct, there was a fatal error committed on the former trial. A juror (Meyer) after a challenge to him by the counsel for the defendants had been withdrawn, was challenged by the plaintiff's counsel for principal cause, which challenge was tried by the court. The juror having stated that "he was

Purves v. Moltz.

opposed to theatrical representations," the plaintiff's counsel claimed that he was incompetent, and requested the court to exclude said juror, to which counsel for the defendants objected. The court excluded said juror, and another was impaneled in his stead, to which decision and course the counsel for the defendant excepted.

Such an opinion entertained by the juror did not show either such relations to the parties, or such bias and incompetency, on account of fixed opinion, as amounted, in law, to a conclusion upon the matters in issue in this case, and was therefore only a ground of challenge to the favor.

There must, therefore, be a new trial on the case, with costs to abide the event.

Ordered accordingly.

PURVES *against* MOLTZ.

New York Superior Court; Special Term, March, 1867.

DEMAND BEFORE SUIT.

Where goods are delivered by mistake to one who has no right to the possession, and he, instead of endeavoring to correct the mistake, lends himself to favor it, and without authority performs services respecting them, and claims thereby a lien, he may be regarded as a wrong-doer from the beginning, and an action will lie against him without demand.

The plaintiff in this action having purchased a sewing-machine, the vendor gave orders to a carrier to deliver the machine to the plaintiff at his address. The carrier by reason of losing the directions delivered the machine to defendant.

The machine being out of order, defendant, who was a machinist, paid the expressage and repaired the machine, his charges therefor being \$9.25, which he insisted upon having before he gave up the machine.

No demand, or time or place of conversion was stated in the complaint, and at the trial defendant's counsel moved to dismiss the complaint, upon the ground that these were material facts which

Purves v. Moltz.

should have been alleged. The motion was denied, and the ruling was excepted to. The same motion was again renewed at the close of the plaintiff's case, when the proofs were all in, which were denied and excepted to.

The jury found a verdict for the plaintiff, both for damages, and for the value of the machine, as assessed by them; whereupon the defendant moved for a new trial, upon the ground that a demand and refusal should have been alleged and proved, in order to enable the plaintiff to maintain his action.

A. H. Reavey, for the defendant;—cited *Fuller v. Lewis*, 3 *Abb. Pr.*, 383; *Gardner v. Humphrey*, 10 *Johns.*, 53; *Jackson v. Rogers*, 11 *Id.*, 33; *Stevens v. Hyde*, 32 *Barb.*, 171; *New York Car Oil Co. v. Richmond*, 10 *Abb. Pr.*, 185; *S. C.*, 6 *Bosw.*, 213.

Hart & Boyce, for the plaintiff, opposed.

ROBERTSON, Ch. J.—The action in this case is for goods wrongfully taken and detained. The complaint alleges them to have been so taken, without any demand for their delivery, which would be necessary to show a right of action, in case the goods came rightfully into the defendant's possession, and they were subsequently wrongfully detained (*N. Y. C. Oil Co. v. Richmond*, 6 *Bosw.*, 213; *S. C.*, 10 *Abb. Pr.*, 185). Such demand was necessary to be alleged in an action for mere wrongful detention, where the original possession was lawful, and a demurrer would lie for want of it.

In this case the evidence showed that the machine sued for was delivered to the defendant by a blunder; that he did nothing when he received such machine to correct such mistake, but rather lent himself to favoring it. He never had any communication with any one respecting it before, had no reason to believe that it was intended for him, yet received it into his possession without authority from the owner, and having good reason to believe from the statement of the express driver that it was not intended for him. If he had done nothing more than become a mere bailee in good faith, he probably would not have been liable to an action of wrongful taking. But forthwith, after receiving it, he commenced to make repairs upon it, without any request or direction from any one—no such purpose hav-

Bushnell v. Eastman.

ing been stated by the party leaving it. Having made such repairs wrongfully, he claimed a lien on the machine for their value, which of course made his detention wrongful. Such conduct may be made to relate back to the original receipt of it, so as to throw light upon the motive for taking and keeping it. If he took it, knowing of the mistake, and intending to get a job and compel the owner to pay for it, or retain possession until he did, he did not receive it for a legitimate purpose with the plaintiff's assent, and was a wrong-doer from the beginning. He knew the expressman had no authority to deliver it to him, and if he sought to take advantage of his neglect or mistake he was not an innocent bailee.

Larceny may be established by the evidence which the subsequent conduct of a party affords of the purpose of the original taking, although the article may be voluntarily delivered. I see no reason why a tort may not also be established by the same means. If the defendant had instantly demolished the machine there would have been no doubt as to the character of the original taking. I cannot perceive any difference in principle between that case and this. The verdict of the jury is therefore conclusive, and the new trial must be denied with \$10 costs.

BUSHNELL *against* EASTMAN.

Supreme Court, Second District; Special Term, 1866.

REFERENCE.—TRIAL BY JURY.

An action to set aside a fraudulent conveyance, on the ground that it was made when the defendant was insolvent, is not to be referred as involving the examination of a long account.*

Motion for a reference.

This action was brought by Cornelius L. Bus'nell against Smith J. Eastman and Levi Eastman. The plaintiff sued on

* See also *Goodyear v. Brooks*, *ante*, 296.

Bushnell v. Eastman.

his own behalf and on behalf of such other creditors as might come in and contribute to the expenses of the action. The object of the action was to set aside a conveyance or mortgage made by the defendant, Smith J., to the defendant Levi, on allegations that it was made with an intent to delay, hinder and defraud his creditors.

The plaintiff now moved for a reference of the action, arguing that it would involve the examination of a long account to determine the question of solvency or insolvency at the time of the making of the conveyance.

Barney, Butler & Parsons, for the motion.

Mr. Jencks, opposed.

GILBERT, J.—Conceding the existence of a power to order a compulsory reference in this case, I consider it is not a proper case for its exercise. The question to be determined relates to the legal effect of certain transactions between the principal defendant and members of his family. An examination of an account is not directly involved, but can become necessary only as a mode of proving a fact in controversy (19 *Wend.*, 108; 10 *Abb. Pr.*, 333). A defendant sued for a libel charging a merchant with being insolvent, might demand a reference on the same ground. Courts of justice are the appropriate places for determining the rights of parties litigant. References are proper only as aids to facilitate the transaction of business. The growing multiplication of them within the last fifteen years has been an evil prolific of individual injustice and public alarm. I am not disposed to encourage, but rather to restrain the practice on this subject. It may be added that one of the reforms intended to be accomplished by the new judicial system under our present constitution, was the abolition of the old practice in equity cases, of taking testimony out of the court before examiners in chancery, and afterwards determining the case on pleadings and proof. To refer such cases without consent, would in some instances be not only to restore, but to add to the evil.

The motion is denied, with \$10 costs, to abide event.

JOHNSON *against* THE CONSOLIDATED SILVER
MINING COMPANY.

Supreme Court, First District; Special Term, February, 1867.

DISCOVERY AND INSPECTION OF BOOKS AND PAPERS.

An application for discovery of books and papers in possession of a party, though made under the provisions of the Code of Procedure, is not to be denied on the ground that it should have been by petition instead of on motion.

To what extent a corporation may be required to submit its books and documents to inspection.

Application for discovery.

In this case the complaint and affidavits set forth that the plaintiff, being owner of some mines in Nevada, valued at \$50,000, made a deed to one Thomas F. Gould, whereby, for the nominal sum of one dollar, the same were conveyed, but with the understanding that Gould would proceed to New York and dispose of the same with other mines then under his control. And furthermore, that he would secure to the plaintiff the purchase price of the mines at whatever sum they were sold. That Gould came on to New York and negotiated with J. A. Cheever and others, which resulted in the formation of the Silver Mining company, with a capital stock of \$8,000,000. That Gould conveyed the mining property, intrusted to him by the plaintiff to be sold, to this company, and that this property, with other interests, formed the basis of the full-paid stock of the company. That the larger portion of this stock was set apart to Gould by way of compensation for the property so conveyed, and other portions were set apart to corporators of the company, for which, in fact, they paid nothing. The plaintiff further alleged that the company have sold of their stock enough to realize \$500,000. That Gould, as secretary of the company, is receiving the sum of \$10,000 as salary. That \$12,000 has been fixed as the salary of the president, and that the salaries of the other officers are proportionately large.

Johnson v. Consolidated Silver Mining Co.

The plaintiff then alleged that Gould and the company are proceeding to dispose of the stock set apart to Gould without making compensation to plaintiff for his mines, which Gould held as his trustee. He also alleged that he had been in the city a long time, seeking a settlement with Gould, who promised compensation from time to time, but had left for Nevada; that the company had knowledge of his rights, but now refused to recognize the plaintiff's claim or to disclose to him their books or contracts with Gould, although he had requested such inspection.

The plaintiff claimed that his interest amounted to the sum of \$50,000, and now asked the court for an order compelling the company to allow such inspection of books, papers, and contracts.

E. W. Dodge, for the motion

Wm. C. Traphagen & Jas. T. Brady, opposed.

SUTHERLAND, J.—The defendant, the Consolidated Silver Mining Company, has not demurred to the complaint, but has answered or intends to answer.

This application is for an inspection, &c., of books and papers in the possession of the company, not under the revised statutes, but under section 388 of the Code. Considering this section and rules 14 to 17 of this court, and the decision of the general term of this district in *Pinder v. Seaman*, 33 *Barb.*, 140 (in which case the application was on affidavits and order to show cause), I do not feel authorized to deny this application on the ground that it should have been by petition, notwithstanding the cases cited by the counsel for the company.

I am somewhat embarrassed by the fact that the plaintiff's notice of motion for the inspection, &c., asks not only for such inspection, &c., for the purpose or with a view of moving for the appointment of a receiver, of (I suppose) such stock, property, rights and interests as the plaintiff may discover the defendant, Gould, may have in the company, or which the company may have or control belonging to Gould, but also for the present appointment of a receiver and an injunction; but, upon the whole, on a re-examination of the papers, I am inclined to think that the plaintiff is entitled to an order for the inspection,

&c., but not as full as the one proposed. I think the company, its officers or agents, should allow the plaintiff to inspect at the office of the company all deeds, contract papers, documents, or entries in books, in its possession or control, showing or relating to the transfers to it by the defendant, Gould, of the mining property or interests, mentioned or alleged in the complaint to have been transferred by the plaintiff to Gould, or showing or tending to show the consideration paid or given, or to be paid or given, by the company for or in consideration of such transfer by Gould, or showing or tending to show the stock or interest, if any, which Gould has in the company, or which the company or any other party or parties have or hold for the use or benefit of Gould. This inspection should be permitted at a reasonable time, or at reasonable times, to be fixed by the order for the inspection, &c., and the plaintiff should have permission to take copies or extracts of all such deeds, contracts, papers, entries, &c. An order containing substantially the foregoing provisions, or to the effect above indicated, may be drawn and settled on notice.

BARNES *against* THE SOUTH SIDE RAILROAD COMPANY.

Supreme Court, Second District; Special Term, November, 1866.

INJUNCTION.—JURISDICTION OF EQUITY.—EMINENT DOMAIN.

A court of equity will not grant an injunction to restrain the construction of a public work, such as a railroad, made under authority of an act of the legislature, on the ground that the plaintiff will sustain indirect or consequential damages by the construction, where his property is not taken or appropriated.

Motion to dissolve an injunction.

Barnes v. South Side R. R. Co

The object of this action was to enjoin the^e defendants from building an embankment, in the construction of their road, across a pond and brook, the water of which was used by the plaintiff for milling purposes.

The plaintiff was lessee, for a long term of years, of the land covered by the water ; and the railroad company had obtained the right of way over the land. A preliminary injunction having been granted by the county judge, the defendants now moved to dissolve it.

Jackson McCue, for the motion.

J. L. Smith, opposed.

GILBERT, J.—The defendants move to dissolve an injunction granted by the county judge of Suffolk, whereby they are restrained from constructing an embankment across a pond, or damming the brook Penatequit in the town of Islip, from which the plaintiff derives the supply of water for turning his mill. The plaintiff is a lessee of the land on which the mill is erected, together with the right, title and interest of the lessor in the brook and the dam, and privilege of ponding other lands of the lessor, and the use of the water for the purpose of erecting and sustaining a grist-mill. The lease was made in 1843, for the term of twenty years, with a right of renewal for a further term of twenty years, which right has been duly confirmed. The plaintiff and those under whom he claims have been in the enjoyment of the rights and privileges granted by this lease, since 1843.

The defendants are a corporation duly created under the general railroad act of this State, and the wrong complained of is the erection of an embankment for their roadway upon land over which they have duly acquired a right of way. The plaintiff alleges that the effect of erecting said embankment will be to reduce the area of the pond, diminish its capacity for holding water, and choke up the springs underneath and adjacent to the embankment, which supply the pond, whereby the volume of water will be diminished ; and that by these means the plaintiff will be subjected to great and irreparable injury. The plaintiff supports these allegations by evidence that the embankment, although only partially constructed, has already

injured his mill. The defendants, on the contrary, furnish evidence that they have not interrupted, and do not intend to interrupt, the natural flow of water in said brook; but that they have an arch or water way where the stream is intersected, sufficient to pass a stream many times greater than said brook, and that the construction of the embankment will not in any wise injure the plaintiff.

The jurisdiction of courts of equity in cases like this is unquestionable. It springs from the necessity of a preventive remedy where material injury is threatened, but the exercise of the power of interference by injunction rests in the sound discretion of the court, and the granting or withholding of it depends on the nature of the case, and the injunction should not issue when the rights asserted by the plaintiff are indefinite or uncertain, or when any doubt exists of a clear and palpable violation of them by defendants (*Eden on Inj.*, 2,619, and cases cited; 2 *Story's Eq.*, § 925).

The right of the plaintiff is an easement, and is appertenant to his mill property. It consists of the right to collect the water flowing in the channel of the brook in a pond across the lands of his lessor above his mill, and to use them for the purpose of running his mill. This burden or servitude was annexed to the lands of the plaintiff embraced in the pond, and the defendants, upon the evidence before me, in their capacity of private owner, must be deemed to have acquired their roadway in subjection to this easement or servitude (*Lampman v. Milks*, 21 *N. Y.*, 505). But the general railroad act authorizes the defendants to construct their road across or upon the stream in question, and requires them to restore the stream to its former state, or to such state as not unnecessarily to have impaired its usefulness (*Laws of 1850*, p. 21, § 28, subd. 5). If then the legislature had the power to confer this authority upon the defendants, the plaintiff cannot complain, because the acts of the defendants were done under legislative sanction, and not unnecessarily, to impair the usefulness of the stream.

The question, therefore, is whether the acts of the defendants of which the plaintiff complains constitute a taking of his property within the meaning of the provision of the constitution which requires compensation to be made for private property taken for public use. Whatever views I might entertain

O'Hara v. Dever.

of this question if it were new, I am satisfied it is no longer an open one in this State, but has been settled by repeated adjudication of its highest court of *Radcliff v. The Mayor, &c. of Brooklyn* (4 *N. Y.* [4 *Comst.*], 195); *Gould v. Hudson Railroad Company* (6 *N. Y.*, [2 *Seld.*], 522; *Bellinger v. New York Central Railroad Company* (23 *N. Y.*, 42); *Corey v. The Buffalo, &c. Railroad Company* (23 *Barb.*, 482). These cases establish the principle that the legislature may rightfully authorize the construction of railroads or other works of a public nature without requiring compensation to be made to persons whose property has not been actually taken or appropriated for the use thereof, but who may, nevertheless, suffer indirect or consequential damages by the construction of such works.

The case is clearly within the principle stated. What property of the plaintiff has been taken or appropriated by or for the use of the defendants? None whatever. He may suffer an injury by having the easement or servitude with which the estate of his lessor, and the roadway of the defendants are burdened, impaired. But this is an injury which the property of the plaintiff suffers in consequence of the construction of a public work under legal authority, and not the taking of his property. Such loss has always been considered *damnum absque injuria* (*Vide* remarks of DENIO, J., 23 *N. Y.*, 48).

The motion to dissolve the injunction must be granted, with \$10 costs.

O'HARA against DEVER.

Court of Appeals, June Term, 1866.

WILLS.—DOWER AND THIRDS.—CHARGE UPON LEGACIES.

A devise and bequest of all the testator's real and personal estate, subject to the dower and thirds of his wife, does not entitle her to a third of the personal estate; but indicates an intention, merely to make a devise and bequest subject to her dower.

O'Hara v. Dever.

It would be otherwise of a direct provision, giving the wife dower and thirds. Under such a provision she would be entitled to one third of the personal estate in addition to dower, after payment of debts and legacies.

Appeal from a judgment of the supreme court.

This was a case made for the purpose of settling a controversy arisen between Mary O'Hara against Dever, surviving executor of the last will and testament of Peter O'Hara, deceased, and as administrator, with the will annexed, of Cecelia A. O'Hara, deceased, and Hannah O'Hara, sole executrix, &c., of Edward L. O'Hara, deceased.

The object was to obtain a construction of a clause in the will of Peter O'Hara, Esq., who died at Brooklyn, in the year 1863, leaving an estate, one-half of which consisted of real and the other half of personal property. Of the personal estate about seventy per cent. was leasehold interests, and the balance of about thirty thousand dollars, was cash and stocks. He left him surviving a widow and three children, and to them left his estate, by a will which was duly proved. He devised to his widow, the plaintiff herein, the house and furniture in which they resided. He provided for one of his children, a son, since dead, an annuity of seven hundred and fifty dollars during life, and charged it upon his whole estate, and then disposed of the residue of his property to his two other children, subject to the dower and thirds of his wife, in the following manner: "I give, bequeath and devise all the rest, residue and remainder of my estate, both real and personal, to my son, Edward Lawrence O'Hara, and daughter, Cecelia A. O'Hara, to be divided between them, share and share alike, subject, nevertheless, to the dower and thirds of my wife, Mary O'Hara."

The cause was submitted to the supreme court, in the second district, at the February term, in 1866, and the following opinion rendered.

J. F. BARNARD, J.—The husband of the plaintiff died leaving a will, and therein bequeathed the whole surplus of his personal estate remaining after the payment of debts and legacies, and the plaintiff is entitled to no share of such estate unless it is obtained by the terms of the will itself. The testator by the fifth clause of his will, bequeaths and devises all the rest,

O'Hara v. Dever.

residue and remainder of his estate both real and personal to his two children; "subject nevertheless to the dower and thirds of my wife Mary O'Hara."

This clause presents two questions. Do the words dower and thirds have reference to the real estate only, and if they can fairly be construed to refer to both real and personal property, what rights did the widow get under them in the personal property bequeathed by this clause? I am satisfied that the word thirds has no reference in this clause to the personal property. If the widow was entitled to distribution as in case of intestacy she would take absolutely one third of the personal property. The clause in question gives all his real and personal property to his children, "to be divided between them share and share alike," subject to the dower and thirds of his wife Mary O'Hara. It seems to me quite improbable that the testator intended his personal property was to be divided in three parts, from this language. The gift is subject to the dower and thirds, burdened with a recognised legal lien and right, and such an estate could only exist as to the real estate. She had no claim to the personal except by this will. The will has not given it except by this clause, and the clause refers to dower and thirds as an existing thing subject to which the estate is given. If the words can be construed to refer to real and personal property, then I think they are not sufficient to bequeath any portion of the personal estate. The gift to the children is absolute, subject to plaintiff's thirds. She had no thirds. The testator has failed to convey to her any interest, and the gift to her children, subject to a claim which had no existence, is an absolute gift.

I think the plaintiff not entitled to any interest in the personal property under the fifth clause of the will of deceased, and that distribution is to be made to the children of deceased, share and share alike, named in that clause, or their representatives.

Lott, J.—I concur.

From the judgment entered in pursuance of this decision the plaintiff, Mary O'Hara, appealed to the court of appeals.

Henry C. Murphy, for the appellants.—I. The testator does not make an absolute disposition of the residuary personal estate to his children, but expressly burdens it with the same charge as

O'Hara v. Dever.

his wife would have had if he were intestate. The devise is "subject to the dower and thirds." And "thirds" relates only to personalty (*Druce v. Denison*, 6 *Ves. Jr.*, 385; *Garley v. Garley*, 8 *Clark & Fin.*, 758).

II. The testator could not have used the word "thirds" in any other sense than in reference to his personal property. Any other construction, and especially that which seeks to make the words "thirds" to be synonymous with "dower," would render the whole of the limitation—that is, the clause "subject, nevertheless, to the dower and thirds of my wife, Mary O'Hara," redundant and nugatory. And for this reason, that the estate would have been subject to the widow's dower, without any such reservation in her favor. The previous devise to her of the house she lived in could not operate to extinguish her dower without an express provision in the will making that devise in lieu of dower. And, therefore, to give these words of limitation any force at all they must be construed to intend her interest in the personal estate, which otherwise she would lose. The testator had evidently something more than dower of the real estate in his mind. He mentions both his personal and real estate, and, therefore, uses apt words of reservation respectively from each estate. And this construction is in accordance with the well-established rule that a meaning must be given to every word in a will, where it can be done consistently with the intention of the testator (*Jarman on Wills*, II., 526—*Am. Ed.*, 16; *Doe v. Rawding*, 2 *Barn. & Ald.*, 448; *Dawes v. Swan*, 4 *Mass.*, 208; *Parsons v. Winslow*, 6 *Mass.*, 175; *Lewis v. Smith*, 9 *N. Y.* [5 *Seld.*], 511).

III. The testator uses the words "subject to the thirds of my wife" not as an actual *lien* upon his personal estate, but as descriptive of an interest which attached to her by law, by reason of her marriage; and though it was contingent and liable to be defeated by the disposition of the property by him, it was, nevertheless, a certain and determinate interest, and as such expressed the purpose of the testator. It is like the interest of a husband, under our present law, in the use of the real estate of his wife who dies without exercising the *jus disponendi* in her life-time. The testator speaks of it, as the highest legal authorities do, as a contingent interest of the wife, which he wishes to

O'Hara v. Dever.

reserve to her. The reasoning that there was no present lien in favor of the widow, and therefore there was nothing with which to charge the estate, is, therefore, inapplicable.

The thirds of a widow in the personal estate of which her husband died seized was originally, at common law, a right which attached to her on marriage, and could not be disposed of by him. One-third of his personal estate went to his widow absolutely; one-third to his children, and one-third he might dispose of. Hence undoubtedly the origin of the phrase *thirds*, as distinct from dower. The law was subsequently changed, but so far only as to permit him to dispose of her third by will. But difficulties existed in other respects as to the mode of distribution in cases of intestacy, and to obviate them the statute of distributions was passed, which does not, therefore, create this right, but merely regulates the administration of the personal estate, in conformity with the common law. There is, therefore, an interest of which a precise idea is given by the expression *thirds* (*Druce v. Denison ut supra*; *Garley v. Garley ut supra*; *Roberts on Wills*, II., 143, *Am. Ed.*, *Precedents*; *Blackstone Com.*, book II, chap. 32).

IV. Equally inapplicable to this case is the reasoning that the testator has not given or bequeathed any of his personal estate to his wife. A gift or bequest, in form, was not necessary. All that was necessary was to retain her interest in her; and reserve it from the general bequest to his children, as his language purports to do.

V. To deprive a wife of her interest in the personal estate, under the statute, requires an express and unequivocal disposition of the estate to others. The law favors the widow's right to dower, because it is a marital right; and for the same reason it will favor her interest in the personal property so far as not to allow it to be defeated unless by a distinct and explicit act on the part of the husband showing an intention to cut her off from the personal property entirely (*Lasher v. Lasher*, 13 *Barb.*, 109, per WILLARD, P. J.—“The claim of dower is always favored”).

VI. The intention of the testator to make some provision out of his personal property for the support of his widow may be seen in the circumstances of the case as they appear in the

will. He evidently intended by the clause in question to make a provision for her support, because it is the only one in which any provision at all appears in the will for such support; and he intended it should be a provision adequate to the station in which they had lived, because the devise to her of the mansion in which they had lived, with "all the furniture, books, silver plate, and all other articles in family use," indicates that he intended the establishment to be kept up by her after his death. It is readily to be seen that her dower in the real estate remaining after taking out the house and lot devised to her would be inadequate to enable her to live in that manner and pay the taxes on the house in a city like Brooklyn, where a net return of not more than five per cent, and in most cases of four per cent, is received from the rent of improved real estate.

The clause, therefore, is to be construed necessarily as intending a provision for her support, and not merely a bequest and devise to his two children. He meant to be as just to her, in regard to his estate, as the law would have been in case of his intestacy. He gives her no more, upon the construction here insisted upon, than her just share according to the judgment of the law when left to its determination, and gives to the children all they are, according to the same judgment, entitled to. The law will not construe his will contrary to what itself considers equitable, if it be consistent with the intention of the will.

Thomas E. Pearsall, and *D. P. Barnard*, for the respondents.—I. The appellant, as the widow of Peter O'Hara, can claim no part of the surplus of personal estate of deceased under section 75 of 2 *Rev. Stat.*, 96, because,—1st. The deceased did not die intestate. 2nd. The whole surplus was bequeathed to his two children, Edward and Cecilia.

II. The testator has expressly disposed of all the surplus of his personal property to his children. Edward and Cecilia; and there is nothing in the bequest from which it can be implied that he intended to give his widow one-third of his personal estate (2 *Jarman on Wills*, 742; *Colleton v. Garth*, 6 *Sim.*, 19).

III. The expression, "subject to the dower and thirds of my wife, Mary O'Hara," cannot be construed into creating a bequest of one-third of the personalty (*Atkinson's Common Form*

in *Conveyancing*, 531, 551, 403; *Beadle's American Lawyer*, 84; 2 *Houseman's Precedents in Conveyancing*, 144, 176, 204; *Martin's Forms of Conveyancing*, 757; 1 *Powell on Devises*, 685; 2 *Property Lawyer (new series)*, 317). 1st. Because, had he intended to give her more of the personal property than was specifically bequeathed to her, he could have used more apt words than "subject," which means a burthen, or a description of the incumbered condition of the property. Thus in conveyances as well as in wills, real estate is conveyed or devised, subject to mortgages, or legacies, or leases, or taxes, or assessments, or the life estate of another. Yet no one has ever contended that the word "subject" was anything more than a notice or description of what had already existed upon the property. 2nd. The words "dower and thirds" are generally used in reference to real estate only. They mean "*dower*" the general right, and "*thirds*" the meted quantity, both meaning the same thing, in this manner, that there must be the former to make the latter, and that the plural "*thirds*" is created when one-third of the rents for life are admeasured out of the different parcels of land. Thus in *Ward v. Ward* (*Amb.*, 299), a testator devised to his wife "in full of all dower and right of dower or *thirds*, which she might have or claim in or out of his real estate." In 2 *Bacon's Abr.*, "*Dower and Jointure*," O. 1 *Dower of the Custom*,—it is said that where such custom prevails the wife cannot waive the provision thereby made for her and claim her *thirds* at common law. In *McCall's Clerk's Assistant* (2nd ed., 556), in form of will devise to wife "in full satisfaction and recompense of and for her *dower* and *thirds*, which she may or can in any wise claim or demand out of my estate," and on page 157, same book, in the form of Release of Dower, the widow "grants, &c., all the *dower and thirds* right, and title of *dower and thirds*, and all other right, &c., of in, and to a certain parcel of land," &c. In *Rathbone v. Dyckman* (3 *Paige*, 30), the Chancellor uses the following language of a widow's dower, "and taking the whole will together I think it is fairly inferrable that the testator intended she should enjoy *her thirds in the real estate*, not specifically devised to her." In the Phelps Will (28 *Barb.*, 121), is a devise to a wife "in lieu of all *dower and thirds* out of my

estate." In *Dorland v. Dorland* (2 *Barb.*, 66), is a devise to a wife "in lieu of *dower and power of thirds*." 3rd. A devise of lands subject to a mortgage or incumbrance, in England, does not throw any charge on the lands to pay the debt, or exonerate the personal estate of the testator therefrom (2 *Jarman on Wills*, 553; *Seale v. St. Eloy*, 2 *P. Williams*, 386). 4th. The testator in the use of the words "subject to the dower and thirds of his wife" refers to something belonging to her, which he had no right to dispose of. 5th. Even if the testator was of the mistaken opinion that the law gave his wife one-third of the personalty, she cannot take any under this will. So, if he was of the opinion that she would be entitled to dower in the houses or leasehold premises.

IV. To sustain the appellant's claim it will be necessary to alter the fifth clause of the will so as to read:—"I give and devise all the rest, residue and remainder of my real estate to my son Edward Lawrence O'Hara and daughter Cecilia A. O'Hara, to be divided between them, share and share alike, subject nevertheless to the dower of my wife Mary O'Hara; and I give and bequeath all the rest, residue and remainder of my personal estate to my wife Mary, my son Edward and my daughter Cecilia, to be divided between them, share and share alike." The doctrine of transportation and substitution of words in a will has never been carried to that extent. If the words "thirds" can be disjoined from "dower" in the will so as to apply to personal estate, what is to prevent it being applied also to the real estate, and thus give the appellant in addition to her dower, one-third absolutely of the remainder of the real estate?

V. There is nothing in the surrounding circumstances of the testator to lead to the inference that he intended, or even desired, to give his wife one-third of the surplus of his personal estate. 1st. He gave her a dwelling-house and all the furniture therein. 2nd. She was entitled to dower in one hundred thousand dollars of real estate. 3rd. She had no children to support out of her income. They were all provided for in the will. 4th. It does not appear that the will was drawn by one incompetent to express in words the intention of the testator.

BY THE COURT.—DAVIES, Ch. J.—This is a case made and submitted to the general term of the supreme court, for the

purpose of obtaining a construction of the last will of Peter O'Hara, deceased; the clause of the will, upon which the controversy arises is in these words: "Fifth, I give, bequeath and devise all the rest, residue and remainder of my estate both real and personal to my son, Edward Lawrence O'Hara, and daughter, Cecelia A. O'Hara, to be divided between them, share and share alike, subject, nevertheless, to the dower and thirds of my wife, Mary O'Hara."

The plaintiff contends, that by this clause of the will, she is entitled to one-third part of all the personal estate of said Peter O'Hara, remaining after the payment of his debts, and the legacies in said will mentioned.

The supreme court held that the personal and real estate of the testator were given to his two children, share and share alike, and that his widow took no part of his personal estate.

By the common law, as it stood in the reign of Henry the second, a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other, but if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabile parte bonorum* was given to recover them (*Black. Com.*, Book II. Ch. 32).

Such continues to be the law in case of intestacy; but the owner of personal property, was subsequently authorized by statute to dispose of the same by a last will. From this provision of the common law, has undoubtedly arisen the general designation of this third part of the husband's personal property, which he could not dispose of by will, and which passed to the widow in case of intestacy, as the widow's thirds. The widow was also endowed of one-third part of all the real estate whereof her husband was seized during coverture, but in which she had only a life estate. This is called and known as her dower, and was a lien or charge on such real estate whereof the wife could not be divested, except by her own act

O'Hara v. Dever.

and consent. The husband could only dispose of his real estate, whether by deed or by will, subject to the rights of his wife to the enjoyment for life of one-third part thereof.

In *Druce v. Denison*, (6 *Ves. Jr.*, 385), a provision was made, which was declared "to be in lieu, bar and satisfaction of all dower or thirds out of his real and personal estate." On the part of the plaintiff, it was contended that the expression "dower or thirds," was to be considered as applicable only to real estate, while on the part of the defendants it was urged as to the rights of the plaintiff to the personal estate, she was deprived of dower, and all right to any share of the personal estate in all events. Lord Eldon said, "As to the word 'thirds,' the clear intention must be taken to mean her interest in case of intestacy. If that word did not occur, I doubt whether the personal estate would not have been included under the word dower. The word 'thirds,' it never used accurately. It is a sort of expression in common parlance descriptive of the interests upon an intestacy." "The plaintiff's argument is too ingenious upon the construction of a settlement, and cannot apply when that word is connected with 'dower,' which would apply to both events, whether there are children or not."

If therefore, in the present instance, the testator had given to his wife her dower and thirds, we should have been authorized in holding, that she was entitled to one third part of his personal estate, in addition to her dower, after the payment of his debts and legacies. But here there is an absolute and unqualified disposition of all the rest and residue of the testator's personal estate, to his two children, to be divided between them, share and share alike. The language used, precludes the idea, that the testator had any intention that his widow should take one-third part of his personal estate. And the subsequent clause of the will, serves only to strengthen this view. The absolute disposition of all his real and personal estate to his two children, was made "subject, nevertheless, to the dower and thirds of my wife, Mary O'Hara." The testator had clearly in his mind, when he used this language, the fact that there was a charge or incumbrance upon the estate, given to his children, subject to which only could they take it. This was the right of dower of his widow in one-third part of his

Walton v. Walton.

real estate. In case of a disposition by will of his personal estate, she had no rights therein to any portion, and it was not therefore subject to any such rights. The word "thirds," as used in this will and in this connection, obviously meant, the same thing as dower, and the word "and" should be used as "or," making therefore the gift to the children of the testator's real and personal estate, subject to the dower or thirds of his wife. This is the clear and plain intent of this will, and we therefore agree with the supreme court, that under it the plaintiff took no portion of the rest, residue and remainder of the testator's personal estate mentioned in the fifth clause of his will.

The judgment appealed from should be affirmed.

Judgment affirmed.

WALTON *against* WALTON.

Court of Appeals, September Term, 1863.

EXECUTORS AND ADMINISTRATORS.—ACTION FOR ACCOUNTING.—
ADMINISTRATOR DE BONIS NON.

An administrator appointed to administer upon the assets left unadministered on the death of the executor of a testator, may maintain an action against an executor of such former executor to recover the assets.

It makes no difference whether such assets have been in part administered.

In such action it is not necessary that the complaint allege that the assets ever came into the hands of the defendant.

Such action is properly brought against the executor of the executor, in the representative capacity.

Appeal from judgment on demurrer to complaint.

This case was brought by Horatio N. Walton, administrator *de bonis non*, against Sarah P. Walton, executrix, &c., of William B. Walton, deceased.

Jonathan Walton died, leaving William B. Walton his exe-

Walton v. Walton.

entor, who, after receiving assets of the estate, died, leaving the defendant his executrix. The plaintiff was appointed administrator, *de bonis non*, of the unadministered assets of Jonathan, the first decedent. He thereupon demanded the assets from the executrix of William B., the deceased executor; and this being refused, brought the present action.

The complaint alleged that William B. Walton, deceased,^f was the sole surviving executor of Jonathan Walton. That he died in 1851, "leaving a large portion of the estate of Jonathan Walton unadministered."

That after the death of William B. Walton, administration, was duly granted to the plaintiff, "of the goods, chattels, credits and effects which were of Jonathan Walton, deceased, with his will annexed, which were left unadministered by William B. Walton, deceased. That the said William B. Walton as such surviving executor," had in his possession for the purpose of administration, a large amount of assets, the property of the estate of said Jonathan Walton, deceased, a particular description of all of which is contained in a schedule, hereto annexed, marked A., which is made a part of this complaint.

That at the time of the death of the said William B. Walton, the said assets and proceeds thereof remained in his hands as such executor unaccounted for. That the defendant is the executrix of the last will and testament of the said William B. Walton, and the action is brought against her in such capacity. By reason whereof the plaintiff insists, that as such administrator as aforesaid, he has a right to have an account taken of such assets and proceeds so remaining unadministered, and a decree for the delivery over and payment to the plaintiff as such administrator.

That the defendant as the executrix of the said William B. Walton, deceased, neglects and refuses to account with the plaintiff for the unadministered assets of the estate of Jonathan Walton, deceased, so remaining unadministered as aforesaid.

The supposed unadministered assets were described in a schedule annexed to the complaint, and forming a part of the complaint. They consisted of three classes or kinds of property:

1. Moneys received by William B. Walton, as such executor,

Walton v. Walton.

in payment of bonds, notes and other demands belonging to Jonathan Walton, at the time of his death.

2. Real estate which was purchased by William B. Walton, as such executor, on his foreclosure of a mortgage, belonging to Jonathan Walton, at the time of his death.

3. Two bonds and a note or their proceeds, executed by William B. Walton to Jonathan Walton, in his life time.

The defendant demurred to the complaint on the ground that the facts did not constitute a cause of action. Judgment having been ordered for the defendant upon the demurrer, at special term of the supreme court, an appeal was taken to the court at general term, where the following decision was rendered:—

BY THE COURT.—ROSEKRANS, J.—The case made by the complaint, which is demurred to, as not stating facts sufficient to constitute a cause of action, is, in substance, this: Jonathan Walton, deceased, made his will, by which he gave the use of his mansion house, and the use and income of one-third of the rest of his real and personal estate, to his wife, for life; and all the rest, residue and remainder of his real and personal estate, including that part given to his wife, after her death, to his three sons and two daughters. Subsequently, the testator made a codicil, by which he revoked the provision in favor of his son Nelson, and gave his son Nelson's part to Asa Sprague, in trust for Nelson, and after his death, to his children. He made another codicil, by which he revoked the provision to his son Edward and daughter Eliza, and gave them the annual income of their shares, and after their death, the principal to their children. Another codicil was made, providing for deductions from each son and daughter, of advances made by the testator to each of them. The testator appointed his wife executrix, and his son, William B. Walton, executor, of his will, and they took upon themselves the execution of it; that the widow died in 1843, leaving assets to Jonathan Walton, deceased, unadministered, and that after her death, all the goods, chattels and credits of the testator came to the hands of William B. Walton, and that he died in 1851, leaving a large portion of the estate of Jonathan Walton unadministered; that letters of administration were granted to the plaintiff, of the goods, chattels and credits of Jonathan Walton, deceased,

Walton v. Walton.

which were left unadministered by William B. Walton, surviving executor of Jonathan Walton, deceased, and that plaintiff qualified as such administrator *de bonis non*; that William B. Walton made his will, appointing defendant his executrix, who proved the will and accepted the executorship of it; that William B. Walton had in his possession, as such executor, for administration, a large amount of assets, the property of the estate of Jonathan Walton, deceased. These assets are set forth, in a schedule annexed, as lands, mortgages, notes and other demands, held by Jonathan Walton at his death, upon which William B. Walton had collected the full sums due; and the said assets and property, and the proceeds and income thereof, it is alleged, remained in William B. Walton's hands, as such executor, unaccounted for, at the time of his death. It is averred that defendant refuses to account unto the plaintiff for the unadministered assets of the estate of Jonathan Walton, deceased, so remaining unadministered. The complaint prays that an account may be taken of said unadministered assets which remained in William B. Walton's hands, and also of such assets as may be in the possession or under the control of the defendant, and of the proceeds of any which have come to her possession, and that the defendant may be directed to deliver over and transfer said assets and proceeds thereof, to the plaintiff.

It must be borne in mind, that there is no allegation in the complaint that any of these assets, or the proceeds thereof, have ever come into the defendant's possession or are under her control, in any capacity, and that there is no allegation that William B. Walton ever wasted, or converted to his own use, any of the assets of the estate of Jonathan Walton, deceased, or the proceeds thereof, or moneys collected thereon. No liability, therefore, of William B. Walton, for having committed *devastavit* of the estate of Jonathan Walton, deceased, is set forth, for which the defendant, as the executrix of his will, would be liable under the statute cited by plaintiff's counsel in his first point (3 *Rev. Stat.*, 5th ed., 202, § 6). This statute is but a re-enactment of the English statute (30 *Car. II.*, st. 1, ch. 7, and of 4 and 5 *William & Mary*, ch. 24, § 12). It was embodied in our earliest statutes (*K. & R. Ed.*, vol. 1, 537, § 7; 1 *R. Laws*, 312, § 8), and was intended to provide a

Walton v. Walton.

remedy at law for a personal tort, committed by an executor who died, and which, at common law, was held to die with the person (2 *Williams on Exec.*, 147). It has no application to a case like that stated in the complaint, of assets of an estate remaining unadministered in the hands of an executor at his death, or money collected by an executor and retained in his hands at his death, unaccounted for, when there has been no breach of trust. Neither is the case made by the complaint within the act of 1858 (*Laws of 1858*, ch. 314, § 1), which provides that any executor or administrator may, in behalf of any person interested in the estate, treat as void and resist all acts done, transfers and agreements made in fraud of the rights of themselves and others, interested in any estate or property held by, or of right belonging to, any such trustee or estate.

The complaint does not state that William B. Walton did any act or made any transfers or agreements in fraud of the rights of any one interested in the estate of Jonathan Walton, deceased. He is alleged to have received certain assets of the estate of Jonathan Walton, deceased, and to have collected the money on them, and to have had these assets or their proceeds in his hands, unaccounted for at his death. Nobody was defrauded by these acts. They were all lawful, and besides, there is no averment that they were illegal. It is the duty of an executor to collect the debts due to his testator, and the complaint in this case does not allege that William B. Walton either spent or consumed or converted to his own use a portion of the money which he collected. On the contrary, it is distinctly averred that he had the entire assets, recovered by him on their proceeds, in his hands at the time of his death, unadministered and unaccounted for. The sole question presented by the demurrer to the complaint, is this: Can an administrator, *de bonis non*, of a testator, appointed after the death of the sole executor of his will, maintain an action against the executor of the deceased executor's will for an account of moneys collected by the first executor, on demands due to his testator, which were in the hands of said first executor unaccounted for at the time of his death, but which moneys are not alleged to be distinguishable from the moneys of the executor who collected them? At common law, if an executor collected a demand due to his testator, the demand was said to be administered (*Grant v. Cham-*

berlain, 4 *Mass.*, 612). 'In *Williams on Executors*, vol. 1, 781, it is said an administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for years, household goods, &c., which remain in specie, and were not administered by the first executor or administrator. If an executor receive money in right of his testator and lays it up by itself and dies intestate, this money shall go to the administrator *de bonis non*, being as easily distinguished to be a part of the testator's effects as goods in specie. But if by some of the means specified in an earlier part of this work, the property or any of the effects of the deceased has been changed by the original executor or administrator, and is vested in him in his individual capacity, such effects will go to his own administrator or executor, and not to the administrator *de bonis non*. In the former part of the work referred to, it is held that even if ready money be left by a testator and come to the hands of his executor, the property in the specific coin must, of necessity, be altered, for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value. The form of a grant of letters of administration *de bonis non*, formerly recited the former grant, and that the first administrator intermeddled with the goods, chattels and the credits of the deceased, and died, leaving some part thereof (that is, of those goods, chattels, and credits) unadministered and not fully disposed of, it then granted power to the new administrator to administer and faithfully dispose of the goods, chattels and credits of, &c., unadministered. This form of grant would seem to imply that if goods, chattels or credits of the testator or intestate were disposed of, they were not unadministered. In the courts of many of the United States, it has been held that an administrator *de bonis non* is only entitled to such goods, chattels and effects of the decedent as are not disposed of or converted into money by the former executor or administrator, unless such money is shown to have been kept separate and distinct from, and not mingled with the individual money of the former executor or administrator. Among other authorities, the following may be cited as holding this doctrine:

In Kentucky, *Slaughter v. Froman*, 5 *Mon.*, 19; *Carroll v. Connet*, 2 *J. J. Marsh.*, 195; *Graves v. Downey*, 3 *Mon.*, 353;

Walton v. Walton.

Lawrence v. Lawrence, 6 *Litt.*, 123. In Virginia, Coleman v. McMurdo, 5 *Rand.*, 51. In Alabama, Chamberlain v. Bates, 11 *Ala.*, 550; Swink v. Snodgrass, 17 *Id. N. S.*, 653; Nolly v. Wilkins, 11 *Id.*, 872. In Mississippi, Byrd v. Holloway, 6 *Smedes & M.*, 323; Prosser v. Kirby, 1 *How. Miss.*, 87; Stubblefield v. McRaven, 5 *Smedes & M.*, 130. In South Carolina, Smith v. Carrere, 1 *Rich. Eq.*, 123, in which this court says, "This is founded on the nature of his commission, which gives him title only to the goods which remain unadministered." In Georgia, Thomas v. Hardwick, 1 *Kelly*, 78; Paschal v. Davis, 3 *Kelly*, 256, it was held to be the rule of the common law that an administrator *de bonis non* was entitled only to the goods which remain in specie, and to debts due the decedent which remain unpaid, in Oglesby v. Gilmore, 5 *Geo.*, 56; Hardwick v. Thomas, 10 *Id.*, 266; Gilbert v. Hardwick, 11 *Id.*, 599.

In Pennsylvania, it was held that an administrator *de bonis non*, could only claim the goods of the testator remaining in specie; that the collection of the testator's debts, or a sale of his goods by the executor, is an administration of them, and precludes the administrator *de bonis non* from claiming any right to them or their proceeds—that they are not embraced in this commission, which is for the administration of the goods, and which were of the testator remaining unadministered (*Potts v. Smith*, 3 *Barwle*, 361). In Indiana, it is held that an administrator *de bonis non* could not maintain an action against the first administrator for a devastavit; that the action would only lie in favor of the creditors and distributors of the intestate (*Young v. Kimball*, 8 *Blackf.*, 167). In Illinois, it was held that an administrator *de bonis non* cannot compel the personal representatives of a deceased administrator to account for assets already administered upon, and that the creditors and distributees of the first intestate alone could maintain the action (*Marsh v. People*, 15 *Ill.*, 285; *Rowan v. Kirkpatrick*, 14 *Id.*, 1; *Newhall v. Turney*, 14 *Id.*, 338).

These authorities are sufficiently numerous and respectable to relieve the doctrine which they establish from the charge of absurdity, and where it is known that a single action in favor of all the creditors, legatees, or distributors of the person whom the administrator *de bonis non* represents, or in favor of only

Walton v. Walton.

one of these prosecuting for himself, and all others who should choose to come in and be made parties to the action, would accomplish the same object which an action by the administrator *de bonis non* would bring about, if he could maintain the action, there would seem to be no very good reason for conferring the right of action upon the latter. I shall assume that the common law rule was as it is stated to be by the cases cited, and proceed to examine our statute for the purpose of ascertaining whether it has been changed in this State. The statute already cited, 3 *Rev. Stat.*, 5th ed., § 6, which provides that "the executors and administrators of every person who, as executor, either of right or in his own wrong, or as administrator, shall have wasted, or converted to his own use, any goods, chattels or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living." It confers no right of action upon the testator *de bonis non* of the deceased owner of the goods. The first executor or administrator was chargeable when living only by the creditors, legatees or distributees of the deceased owner, and as the executor or administrator of the first executor or administrator is only chargeable for a devastavit by him, in the same manner as his testator or intestate would have been if living, the inference is irresistible that the administrator *de bonis non* cannot maintain an action for such devastavit.

Our statute provides that no executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but that on the death of the sole surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, shall be issued in the manner and with the authority as afterwards provided (3 *Rev. Stat.*, 5th ed., 156, §§ 17 and 11). 3 *Rev. Stat.*, 5th ed., 747, provides that an executor of an executor shall have have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor. And section 45, 3 *Rev. Stat.*, 5th ed., 162, provides that if all the executors or administrators to whom letters testamentary or of administration shall have been granted, shall die or become incapable of executing the trust reposed in them, or the power and authority of all of them,

Walton v. Walton.

shall be revoked by the surrogate having authority, he shall issue letters of administration upon the goods, chattels, credits and effects of the deceased left unadministered, with the will annexed or otherwise, in the same manner as in the statute is directed in regard to the original letters of administration, and that the administrator so appointed shall give bonds in the like penalty, with like sureties and conditions as before are required of administrators, and shall have the like power and authority. Now it will readily be perceived that these statutes confer no authority whatever in support of the doctrine contended for by plaintiff. The defendant in this case claims no right to administer upon the estate of Jonathan Walton deceased, or to take any charge or control over the estate, effects or rights of Jonathan Walton, deceased. The money collected by William B. Walton, as executor upon the debts due to his testator, unless it was kept separate and distinct from his own money, so as to be distinguished from it, became the property of William B. Walton, and he thereby and from thence was chargeable with it value (2 *Williams on Exrs.*, 542). If it was in his hands at his death, it was assets of his own estate, and passed to the defendant as his executrix (2 *Rev. Stat.* [5th ed.], 169, § 6, subd. 8). If an executor changes the form of the testator's estate, the general rule is that this is a conversion, and as money has no ear marks, it cannot be followed. But the executor by such transaction has made himself liable to a *devastavit*, for which the party injured must seek satisfaction out of the executor's own effects (2 *Williams on Exrs.*, 1665). The commission of the administrator *de bonis non*, under the statute cited, is precisely such as was always granted to such an administrator. The power and authority conferred upon him by the statute, which the statute declares shall be like that of the first executor or administrator, extends to such goods, chattels and effects as have not been administered, and to such only. The case of *Goodyear v. Bloodgood* (1 *Barb. Ch.*, 617), holds that the administrator *de bonis non* has no interest in moneys collected by a former executor of the decedent, and which are in the hands of such executor at the time of his death unaccounted for. I think the demurrer is well taken, and that the order of special term should be affirmed.

From the decision thus made, the plaintiff appealed to the court of appeals.

T. B. Mitchell, for the appellants: Two questions are involved in this case:—1. As to the liability of the defendant in her representative capacity. 2. As to the extent of the powers of the plaintiff as administrator *de bonis non*. We claim, in the first place, that both of these questions are settled in favor of the plaintiff by the statutes of this state, without reference to the common law, or statutes or laws of other states and countries.

I. The defendant Sarah P. Walton, is liable, as executrix of William B. Walton, to account to the proper party for "any goods, chattels or estate" which belonged to Jonathan Walton at his death, and which may have been wasted or converted or retained by her testator, William B. Walton, deceased, and an action for that purpose may be brought in the supreme court (3 *Rev. Stat.*, 5th ed., p. 202, § 6; *Willard's Eq. Jurisp.*, 560; 2 *Hill*, 180; *Id.*, 225; 13 *Wend.*, 591; 3 *Ed. Ch.*, 203; 20 *How. Pr.*, 354).

II. Assuming that William B. Walton converted the estate of his testator, and mingled the proceeds with his own estate, we insist that the plaintiff as administrator *de bonis non*, is invested with the title to such proceeds and the right to maintain this action for an account (3 *Rev. Stat.*, [5th ed.], 156, § 17; *Id.*, p. 162, §§ 45, 44; *Id.*, p. 747, §§ 11, 13, 17, 18).

III. If we look beyond the statutes of this State, which we submit, make the right of the plaintiff to maintain this action quite manifest, into the authorities of other states, we shall find the views of the plaintiff generally sustained. The authorities are various and conflicting, differing according to the different local laws and statutes of the respective states where the questions have arisen, but the general current of authority sustains the right of the plaintiff to maintain this action in his representative capacity (2 *Brock [Va.]*, 159, 164; 5 *Rand.*, 51; 5 *Harring [Del.]*, 182).

S. W. Jackson, for the respondents.—I. If the property which is the subject of this action, is, as it is claimed by the plaintiff to be, assets which were left unadministrated by William B. Walton as executor as aforesaid, the facts stated in the com-

Walton v. Walton.

plaint, do not constitute a cause of action against the defendant as executrix in favor of any person. (a.) They do not create or show a right to demand or have of the defendant an account of such assets. 2 *Rev. Stat.*, 113, § 2, provides that "actions of account, and other actions on contract, may be maintained by and against executors, in all cases in which the same might have been maintained by or against their respective testators." This furnishes no authority for the maintenance of an action, on account of anything done or omitted by a testator in any cases other than those in which the action might have been maintained by and against such testator. The main fact alleged is, that the defendant's testator as executor of Jonathan Walton had in his possession at the time of his death, a large amount of assets of such estate and their proceeds unaccounted for. This would not have constituted a cause of action against William B. Walton in his life time. He had a right to the possession of such assets by virtue of his executorship. He had moreover a right, and it was his duty to convert the assets into money, and to receive the proceeds and income thereof. No misfeasance or malfeasance is imputed to him. An action against an executor for an account of his proceedings, as such executor, can only be maintained by one who has a legal demand against the estate as creditor, legatee, or in some other capacity, by reason whereof he has a claim upon the assets in the hands of the executor. No person is shown to have any such demand. But the action is not brought for an account of the proceedings of William B. Walton as executor. The presumption, in the absence of all allegations to the contrary is, that he has faithfully administered to the extent of the assets administered upon. The complaint, in reference to this, simply alleges that at the time of William B. Walton's death, a large amount of assets remained in his hands, as such executor, unaccounted for, and claims that the plaintiff is entitled to have an account rendered by the defendant as his executrix of the assets so remaining unadministered. And this too, without alleging that any part of such assets ever came to the defendant's possession. In other words, it claims that the defendant, as executrix of William B. Walton, is liable to an action to compel her to make a statement of the assets of Jonathan Walton's estate, upon which her testator did not administer, and of which it is to be presumed that

Walton v. Walton.

the plaintiff duly obtained possession, and that, too, without showing how such a statement may be useful or necessary. The presumption that the plaintiff has duly obtained possession of all the assets left unadministered by William B. Walton, arises from the want of any allegation to the contrary. He is entitled to such possession, and the law presumes, in the absence of all proof to the contrary, that every one is in the undisturbed enjoyment of his rights. (b.) The facts stated in the complaint do not show the defendant to be liable for a conversion of any unadministered assets of the estate of Jonathan Walton. 1. She cannot be made liable in her representative character for the conversion of such assets. A conversion by her would be a conversion in her individual character and not as executrix. Such assets are no part of the estate which she represents, and she cannot by intermeddling with the property of other persons render such estate liable therefor. 2. But it is not alleged that she ever had possession of any such assets. 3. There is no allegation of any waste, or conversion to his own use, of any such assets, by William B. Walton, the defendant's testator.

.II. The facts stated in the complaint do not constitute a cause of action in behalf of the plaintiff. (a.) By the common law, an administrator *de bonis non* can not maintain an action against the executrix of a deceased executor, to recover moneys received by such former executor, on the sale or collection of assets belonging to the estate of his testator, nor to have an account of his proceedings as such executor. The right to such action and account is restricted to the creditors and legatees of the original testator. "An administrator *de bonis non*, is entitled to all goods and personal estate, such as household goods, &c., which remain in specie, and were not administered by the first executor or administrator. And if A. dies intestate, and his son takes out administration to him and receives part of a debt being rent in arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate, this acceptance of the note is such an alteration of the property as vests it in the son, and therefore, on his death it shall go to his administrator, and not to the administrator *de bonis non*" (3 Bacon Abr., 20). "If the goods of the testator remain in specie, they shall go to his administrator *de bonis non*, because in that case it is notorious which were the goods of the testator, and they are distin-

Walton v. Walton.

guishable" (*Salkeld*, 306). "An administrator *de bonis non* is entitled to all the goods and personal estate which remain in specie and were not administered by the first executor. If an executor receives money in right of his testator, and lays it up by itself, and dies, this money shall go to the administrator *de bonis non*, being as easily distinguished to be a part of the testator's effects as goods in specie. But if the property or any of the effects of the deceased has been changed by the original executor and is vested in him in his individual capacity, such effects will go to his own executor or administrator, and not to the administrator *de bonis non*" (1 *Williams on Exec.*, 781). And the following cases, selected from the reports of the different States, show a recognition of our leading proposition as an established principle of the common law.

New York: *Conklin v. Egerton*, 21 *Wend.*, 430; *Gilchrist v. Rea*, 9 *Paige*, 66; *Trustees, &c. v. Kellogg*, 16 *N. Y.*, 83, 90; *Dakin v. Demming*, 6 *Paige*, 95.

Maryland: *Neale v. Hagthorp*, 7 *Gill. & J.*, 13; *S. C.*, 3 *Bland*, 551; *Hagthorp v. Hook*, 1 *Gill. & J.*, 270.

Virginia: In *Coleman v. McMurdo*, 5 *Rand.* 51; a case decided in the court of appeals of Virginia, in 1827, after a full review of all the authorities on this question, the court says: "This review shows us that in all contests for the property of the intestate, between the administrator *de bonis non* and the representatives of the first administrator, a conversion has uniformly been held to withdraw the property from the administrator *de bonis non*, and the statute making the administrator of the first executor, or administrator, suable for the devastavit of the first, does not give the power to the administrator *de bonis non*, but gives it to the creditors and distributees. "To meet this formidable array, what is there on the other side? not one single case, not the dictum of a single judge; not the assertion of an elementary writer that an administrator *de bonis non* can support an action, or file a bill for an account against the representatives of a delinquent executor or administrator. This absence of authority alone, is conclusive evidence that in England such a right was never claimed." In this case, and also in *Morris v. Morris*, 4 *Grat.*, 293, and *Cheatam v. Burfoot*, 9 *Leigh.*, 580, it was decided that an administrator *de bonis non* could not maintain an action against the representa-

Walton v. Walton.

tives of the first administrator for a settlement of his accounts (see *Dykes v. Woodhouse*, 3 *Rand.*, 287).

Kentucky: A bond executed to an administrator as such, for assets sold by him, is not an asset in the hands of an administrator *de bonis non*; not being an effect left in specie by the testator (7 *J. J. Marsh*, 128). An administrator *de bonis non*, can not maintain an action on the administration bond of a former administrator against his sureties and representatives (*Bradshaw v. Commonwealth*, 3 *J. J. Marsh.*, 632). Neither can he maintain an action against a prior administrator for the recovery of assets converted by him (*Oldham v. Collins*, 4 *J. J. Marsh.*, 49; *Felts v. Brown*, 7 *J. J. Marsh.*, 147). An administrator *de bonis non*, is entitled to the chattels of the decedent, not disposed of or converted into money by the first administrator; but not to the price of articles sold, unless it be shown to have been kept separate and distinct, and not mingled with the individual moneys of the administrator (*Slaughter v. Froman*, 5 *Monroe*, 19; *Carrol v. Connet*, 2 *J. J. Marsh.*, 195; *Graves v. Downey*, 3 *Monroe*, 353; *Lawrence v. Lawrence*, 6 *Litt.*, 123).

Alabama: An administrator *de bonis non* can not maintain an action against the representatives of a former administrator to recover money received by him in the course of his partial administration, and not accounted for nor paid over. His authority embraces only such personal property as has not been converted into money (*Abney v. Pickett*, 21 *Ala. N. S.*, 739; *Chamberlain v. Bates*, 11 *Ala.* [2 *Porter*], 550; *Swink v. Snodgrass*, 17 *Ala. N. S.*, 653; *Nolly v. Wilkins*, 11 *Id.*, 872; see *Harbin v. Levi*, 6 *Id.*, 399; see *Caller v. Boykin*, *Minor*, 206). A settlement of the former administrator's accounts can only be had between his representatives and the distributees or legatees (Case last cited).

Mississippi: An administrator *de bonis non* can maintain an action, only for the assets which remain unadministered by the former administrator. If, upon settlement of his accounts as administrator, a balance is found due the estate, the creditors and distributees must sue for it; the administrator *de bonis non* can not (*Searles v. Scott*, 14 *S. & M.*, 94; *Prestidge v. Pendleton*, 24 *Miss.*, 80; *Byrd v. Holloway*, 6 *S. & M.*, 323; *Prosser v. Yerby*, 1 *How. Miss.*, 87; *Stubblefield v. McRaven*, 5 *S. &*

Walton v. Walton.

M., 130 ; *Kelsey v. Smith*, 1 *How. (Miss.)*, 68 ; *Gamble v. Hamilton*, 7 *Miss.*, 469 ; *Miller v. Womack*, 1 *Freem. Ch.*, 486). Money collected by an attorney, on a demand given him by an administrator for collection, is not assets of the estate which an administrator *de bonis non* can claim. It must go into the accounts of the prior administrator (*Sloan v. Johnson*, 14 *S. & M.*, 47).

South Carolina : In *Smith v. Carrere*, 1 *Rich. Eq.*, 123, a case decided in the court of chancery in South Carolina, it was held that an administrator *de bonis non* can only recover from the personal representatives of a deceased administrator such personal estate of his intestate as remains in specie, and has no right to call them to an account for any part of the estate wasted or converted by the deceased administrator. The court says: "This is founded on the nature of his commission, which gives him title only to the goods which remain unadministered. Before the statute of distribution, an executor was entitled to the whole personal estate, subject only to the payments of debts and legacies. When therefore, he sold or converted any part of it, the goods so sold or converted were administered and no longer in his possession as executor" But held in *Villard v. Robert*, 1 *Strobb. Eq.*, 393 ; that the *a. d. n.* could compel the representatives of deceased executor to account in equity for proceeds converted into money (See *Miller v. Alexander*, 1 *Hill Ch.*, 25 ; *Thompson v. Buckner*, *Riley Ch.*, 33). Contra in N. C. (*Quince v. Quince*, 1 *Murph.*, 160 ; *Satterwhite v. Carson*, 3 *Iredell Law*, 549).

Georgia : An administrator *de bonis non* is entitled to receive from his predecessor or his representatives only such goods, chattels and credits belonging to the estate of his testator, as remain in specie. He can not maintain a suit for waste or conversion of assets by his predecessor.—Such suit or a suit for a settlement of the administration accounts can only be maintained by creditors, legatees and distributees (*Horskins v. Williamson*, *T. U. P. Charlt.*, 145 ; *Thomas v. Hardwick*, 1 *Kelly*, 78 ; *Paschal v. Davis*, 3 *Kelly*, 256). Distributees may also sue (*Shorter v. Hargroves*, 11 *Geo.*, 658 ; *Knight v. Lasseter*, 16 *Geo.*, 151 ; *Arline v. Miller*, 22 *Id.*, 330). At common law, an administrator *de bonis non* is entitled only to the goods which remain in specie and to the debts due the intestate which remain unpaid, but under the Act of 1845, he

Walton v. Walton.

may call his predecessor or his representatives to account, touching the entire administration of the estate, and they are liable to him, as at common law they were liable to creditors and distributees (*Oglesby v. Gilmore*, 5 *Geo.*, 56; *Hardwick v. Thomas*, 10 *Geo.*, 266; *Gilbert v. Hardwick*, 11 *Geo.*, 599).

Indiana: An administrator *de bonis non* sued administrator of first administrator for a devastavit;—*Held*, that the suit would not lie—that the action should have been brought by creditors, &c., of the intestate (*Young v. Kimball*, 8 *Blackf.*, 167; but see *State v. Porter*, 9 *Ind.*, 342).

Illinois: An administrator *de bonis non* can not compel the personal representatives of a deceased administrator to account for assets already administered upon; creditors and distributees alone can maintain the action (*Marsh v. People*, 15 *Ill.*, 285; *Rowan v. Kirkpatrick*, 14 *Ill.*, 1; *Newhall v. Turney*, 14 *Ill.*, 338).

Pennsylvania: An administrator *de bonis non* can claim only the goods of the testator remaining in specie (see *Weld v. McClure*, 9 *Watts*, 495); the collection of the testator's debts, or a sale of his goods by the executor, is an administration of them, and precludes the administrator *de bonis non* from claiming any right to them or their proceeds changed by statute (*Little v. Walton*, 23 *Penn.*, 164). They are not embraced in his commission which is for the administration of the goods &c., which were of the testator and remaining unadministered (*Potts v. Smith*, 3 *Rawle*, 361).

Connecticut: *Alsop v. Mather*, 8 *Conn.*, 584.

Massachusetts: If a judgment recovered by an administrator upon a debt due the estate, is satisfied, then the debt is an administered asset (*Grout v. Chamberlin*, 4 *Mass.*, 613). This case was decided in 1808. Since then, it is provided by Revised Statutes of Mass., ch 70, § 11, that all monies collected of an administrator, his representatives or sureties, for a devastavit shall be assets to be administered by administrator *de bonis non*. In some of the states, acts have been passed by their legislatures, giving to administrators *de bonis non* the power and authority claimed by the plaintiff in this action. But before or without such a legislative enactment, only a single case can be found in any of the States, in any degree opposed to our

Walton v. Walton.

proposition ; and we maintain it to be the law wherever the common law prevails, unaffected by statutory laws. The excepted case referred to (*Hill v. Alexander*, cited by the plaintiff's counsel), stands entirely unsupported, and it is difficult to conceive upon what theory or principle the decision is based. Besides the principle of the case was overruled by the same court ten years afterwards, in the case of *Smith v. Carrere*, above cited. Opposed as it is by the array of authorities which have been cited, and disregarded by the very court which decided it, it cannot be regarded as of any weight.

(b.) The principle of the common law which restricts the authority of administrators *de bonis non*, to the goods and chattels of the testator which remain in specie, is unaffected by the statute law of the State, except as hereinafter stated. The constitution of the State provides, that such parts of the common law which were in force in 1777, and which have not been repealed or altered by legislative enactments, shall be, and continue the law of the State, subject to such alterations as the legislature shall make. Several acts have been passed by the legislature of the State, conferring new powers and imposing new duties upon administrators *de bonis non*. It will be found that they are now permitted to take out executions, have writs of *scire facias*, and writs of error upon judgments obtained by their predecessors (1 *Rev. L.*, 312, § 9 ; 2 *Rev. Stat.*, 439, § 13. 18). They are also authorized to cite a former administrator or executor whose authority has been revoked or superceded, to account before the surrogate, in the same manner as is provided for a creditor (2 *Rev. Stat.*, 95, § 74). These are powers which they did not possess under the common law (*Grant v. Chamberlin*, 4 *Mass.*, 613 ; *Dale v. Roosevelt*, 8 *Cow.*, 344). But the plaintiff's counsel insists, that by our statutes they are also invested with a title to the proceeds of property which belonged to the estate which was converted by a deceased executor ; and with a right to maintain an action against the representatives of such executor for an account. The authority and power conferred by our statutes upon administrators *de bonis non*, so far as it relates to property, is confined to the goods, chattels, credits and effects of the deceased left unadministered (2 *Rev. Stat.*, 71, § 17 ; 78, § 45). 2 *Rev. Stat.*, 78, § 45, provides, that in case of the death of all the executors to whom letters testamentary

have been issued, "the surrogate having power to grant letters originally, shall issue letters of administration upon the goods, chattels, credits and effects of the deceased, left unadministered." There is therefore no power or right conferred by statute, over, or concerning any property except assets left unadministered by the former executor or administrator. These and these alone are assets in the hands of the administrator *de bonis non*. But, it is said, that the same section, § 45, gives to the administrator *de bonis non*, the same power and authority that is conferred upon an administrator in the first instance. This is true; so far as it relates to property to be administered, but it will not be contended that it extends in either case beyond what are assets. In other words, the statute confers upon an administrator *de bonis non*, the same power and authority over the assets left unadministered, that an original administrator possesses, in relation to the general assets of the estate. The only inquiry remaining then, is, what is the meaning of "assets left unadministered?" as used in these statutes. The plaintiff's counsel insists, that it comprehends not only goods, &c., of the testator which remain in specie, but, also the proceeds of all assets which have been converted into money by the executor. But the statute makes use of no new terms; the same words have been used as descriptive of the property which an administrator *de bonis non*, was to administer, from the first appointment.—In fact, these words have in another language, always formed a part of the very title of the character. And they have repeatedly received, both in England and in this country, and even in this State, a judicial construction, and have always been adjudged to comprehend only goods, credits and effects which belonged to the original decedent, and which remain in kind—they have been adjudged not to comprehend notes received by previous executors in the sale of assets, or judgments recovered by him as such, upon debts due the testator (*Grout v. Chamberlin*, 4 *Mass.*, 611; *Dale v. Roosevelt*, 8 *Cow.*, 344—5). In the last case, decided in the court of errors, *SPENCER, J.* says: "The case of *Grout v. Chamberlin* contains a true exposition of the common law respecting the privity between an administrator *de bonis non* and the estate of the last executor of the deceased upon the facts there presented. That was a judgment recovered by the executor in his own name as such,

Walton v. Walton.

which he might have reversed, and which his personal representatives therefore might reverse, but which having become a species of assets in the hands of the executor, reduced to possession by him, could no longer be considered as unadministered effects of the deceased. A right of property in the debt was acquired by the executor by the rendition of the judgment, and as his estate would be liable for its collection and application, his personal representatives only could enforce it, or take measures to render it available." And again, the same judge says, on page 345 of the same case: "A debt which has become merged in a judgment recovered by an executor in his own name, is no longer a part of the estate of the testator, it is a part of that of the executor." This case was decided in 1826, and shows that at that time, the law in this State in regard to what constituted unadministered assets, was as we insist it is now. And as evidence of a general recognition of the principle contained in these remarks of senator Spencer, as existing law, I refer to 2 *Rev. Stat.*, 449, §§ 13 and 18, allowing administrators *de bonis non* to have execution upon judgments recovered by any person who preceded them in the administration of the same estate, and also to bring and defend writs of error, upon any such judgment. These provisions, which were enacted for the first time at the revision of the statutes, 1830, effected a change in the law, by making uncollected judgments recovered by a previous executor or administrator in his name as such, assets to be administered by an administrator *de bonis non*. They do not constitute such judgments unadministered assets, but they give to the administrator *de bonis non* a right to have and administer certain property, to which by the common law he had no right; property other than that which constitutes unadministered assets. If it should be said that these provisions were adopted simply for the purpose of giving to the administrator *de bonis non* a control over that which was his before, but of which he could not avail himself, for the reason that the title stood in the name of another, we would say in the first place, that the reason given for denying him such control was, that the property was not his—and in the second place, if the property was his, he would by reason of the privity that would then exist between himself and his predecessor in regard to it, be able to make it available without such provisions. *Dale v.*

Walton v. Walton.

Roosevelt (case last cited), establishes the right of an administrator *de bonis non*, to a writ of error in his own name, on a judgment against his predecessor as administrator. If therefore, judgment recovered in the name of the executor, as such, on a debt due the testator, were not assets left unadministered by such executor, with no reason can it be contended that money received by the executor in payment of debts due the testator is any portion of the assets left unadministered. And yet this constitutes the largest and most important class of property described in the complaint.

(c.) Neither has the statute law of this State conferred upon administrators *de bonis non* any right to maintain an action for an account against the representatives of a prior executor or administrator. The only statutes in any wise relating to an accounting, by or for a prior executor or administrator, are 2 *Rev. Stat.*, 114, § 6, and 2 *Rev. Stat.*, 95, § 74. The statute of 30 *Chs.* 2, ch. 7, contains the same provision as 2 *Rev. Stat.*, 114, § 6, and the court (in *Coleman v. McMurdo*, 5 *Rand.*, 51) said in reference to it, that the executor or administrator of the first executor or administrator was thereby made chargeable to the creditors and distributees, and not to the administrator *de bonis non*. The statutes of Illinois contain the same provision as 2 *Rev. Stat.*, 95, § 74 (*Ill. Rev. Stat.*, ch. 109, § 75), and it was held in case of *Marsh v. People* (15 *Ill.*, 285), that an administrator *de bonis non* could not compel the representatives of a deceased administrator to account for assets already administered upon; *aliter* as to a removed administrator by reason of such statute. But the statute in question does not authorize the administrator *de bonis non* to bring an action for an account even against a removed administrator or executor; it merely empowers him to institute proceedings for an accounting before the surrogate "in like manner as is provided for a creditor," but it gives him no interest in or control over any balance that may be found to be due from such prior representative. The jurisdiction of the surrogate in such accounting when so instituted, is limited to stating the account. The power to decree payment and distribution, with which he is vested in all other final accountings by executors and administrators, is in this case specifically withheld by section 78. The object of the statute is to enable the administra-

Walton v. Walton.

tor *de bonis non*, by compelling the rendition of an account before the surrogate, to ascertain what moneys have been paid to the distributees, in order to know what amounts are due to them respectively; and also, to ascertain which of the inventoried assets remain unadministered. The citation in such case, so far as the administration *de bonis non* is connected with the proceeding, is in effect simply an order for a discovery of evidence, which is necessary to a proper discharge of his trust. If a right of action for such account is conferred by this statute, then it necessarily follows that the surrogate has a right of action for the same purpose conferred upon him by the succeeding section (79), which authorizes him to issue such citation of his own motion. Since both of these statutes came into operation, a case arose in the court of chancery of this State (*Good-year v. Bloodgood*, 1 *Barb. Ch.*, 617), which was analogous to this action; the only difference being that the bill for accounting was filed by legatees; and the objection was specifically taken by the defendant, who was the executor of the first executor, that the bill should have been filed by the administrator *de bonis non*. The chancellor held that the complainants were the proper parties; that they alone had any interest in compelling the executor of their testator's executor to account for and pay over monies received by him in his life time; and that it was not necessary that the administrator *de bonis non* should be made a party to the suit in any form. 4. The act of 1858 (ch. 314), to which importance seems to be attached by the plaintiff's counsel, is in no wise applicable. It applies only to cases of fraud on the part of executors and other trustees. Here, there is no pretence of fraud.

(d.) No right of action accrues to the plaintiff against the defendant as executrix of William B. Walton, in consequence of the possession by him at the time of his death of real estate, which was bid in by him as executor of Jonathan Walton on the foreclosure of a mortgage which belonged to said Jonathan Walton at the time of his death. 1. If this property be deemed to be an item of assets belonging to the said estate, which remained unadministered by the said William B. Walton, then the plaintiff, as administrator *de bonis non*, is entitled to and he has an action of ejectment against any person having it in possession. If the defendant is in the possession of it,

such action may be maintained against her; but not against her as executrix. She can hold, in such character, only property which is assets of the estate which she represents. The possession by her of all other property is in her own right, and all actions to recover the possession of such property must be brought against her individually. This has been twice decided in this very case; by Justice ROSEKÉANS, at special term on demurrer to the first amended complaint, and by Justice GOULD, on demurrer to the third amended complaint. And the principle was again recognized in the decision of this case at general term in the 4th district, when it was there on demurrer to the second amended complaint. 2. But if the property in question, should not be deemed to be a portion of the assets remaining unadministered, never having belonged to the testator, it will fall under the previous subdivisions of this point; which show that the plaintiff has no right to it or control over it.

(e.) No action will lie against the defendant as executrix of William B. Walton, in consequence of the possession by him at the time of his death, of his own notes and bond, to Jonathan Walton, deceased, or their proceeds. 1. If the notes &c., remained in his hands at the time of his death, they were unadministered assets, and the plaintiff is entitled to them, and can maintain an action of trover or replevin against any person who has them and refuses to deliver them up. No action however, will lie against the defendant as executrix even in such case; the principle which prohibits an action against her in such character, for the real estate, applies to the notes also. But there is not enough alleged to maintain an action against her, even individually—no conversion is alleged. 2. But the property as described is not unadministered assets. Executors are chargeable with their debts to the testator from the time letters testamentary issued. But it is not alleged that the notes, &c., were in William B. Walton's hands, at the time of his death—the allegation relates to notes, &c., or their proceeds. It cannot be said, therefore, of these items of property, that they were assets of the estate remaining in kind in the hands of the executor—and if not, they were not unadministered assets, and the plaintiff has no right to, or control over them. 3. The allegation being in the alternative, that notes, &c., or their proceeds, remained in the hands of William B. Walton at

Walton v. Walton.

the time of his death, it is necessary to sustain the complaint, that the possession of either should constitute a cause of action.

HOGEBOOM, J.—If this case turns upon the allegations in the complaint, independent of those contained in the annexed schedule, I have no doubt that the action is well brought; and I do not see that they are so far varied by the contents of the schedule that that should alter the results at which we should otherwise arrive. Those allegations are explicit, that William B. Walton, had, at his death, in his hands, a large portion of the assets of Jonathan Walton, unadministered; that the plaintiff has been duly appointed administrator of such unadministered assets, and that the defendant has been duly appointed and qualified as executrix of the last will and testament of William B. Walton, deceased, and refuses to account for such unadministered assets.

Prima facie and unexplained, I do not see why this does not make out a perfect cause of action, in favor of the plaintiff against the defendant. As there is no averment in the complaint that these assets have been collected, nor in either the complaint or the schedule, that the debts and expenses of administration of the estate of Jonathan Walton have been defrayed, there is nothing to show but that these assets are absolutely needed for such purpose; and they can only be applied to that object by the duly appointed legal representative of the estate of Jonathan Walton, deceased.

Independent of this, and for all legal purposes, the plaintiff is the sole legal representative and possessor of the unadministered assets of said deceased, and is entitled by law to the custody of the property, and the possession of the assets, for the purpose of administration. He may bring suits to recover the property against any person in possession of it; trover or replevin, if it exists in specie in the condition it was at Jonathan Walton's death, or assumpsit, or other appropriate action, if it has been converted into money.

It may well be presumed from the allegations in the complaint, that the unadministered assets are in their original condition,—that is, in the shape they were at the death of Jonathan Walton. If so, there does not seem to me a possible doubt that the plaintiff is entitled to these from any and every

Walton v. Walton.

person in whose possession they may be. They belong to the plaintiff as owner,—owner in trust, it is true, for the purpose of administration; but, nevertheless, owner in fact. They are unadministered assets; they require administration; and no person in the world can perform this office upon them except the plaintiff. Indeed, if they have been rightfully or wrongfully converted into money, they are nevertheless unadministered assets of Jonathan Walton, deceased, are so charged to be in the complaint, and so admitted to be by the demurrer; and, therefore, rightfully belong to the plaintiff, and to the plaintiff alone. Even if they have been rightfully converted into money by the executorial act of William B. Walton, this is but a partial administration of them; they have not been fully administered; we are bound to assume that they require further administration, for they are charged and admitted to be unadministered assets; and in the face of such an admission, we are not permitted to say that they require no further act of administration. They will be absolutely indispensable to pay debts of Jonathan Walton, deceased, and no one can employ them legitimately for such a purpose, except the plaintiff.

Wherever, therefore, they are found, in whomsoever's possession they may be, such person is bound to deliver them over into the possession of the plaintiff.

Regarding this right of the plaintiff, therefore, as absolute and undeniable, it seems to follow, as a necessary consequence, as has just been stated, that every person in whose possession they may be, is bound to deliver them up, or account therefor; and, therefore, that the defendant is in no legal condition successfully to resist a demand of the same.

But conceding the plaintiff's right to the possession of unadministered assets, it is averred that the action is not well brought against the defendant, for these reasons. 1st. Because William B. Walton was, before his death, rightfully in possession of them, rightfully converted them into money, if he did so convert them, and rightfully retained them, for the purpose of paying debts and legacies, and distributive shares of Jonathan Walton's estate. 2nd. Because there is no allegation in the complaint that these assets, in whatever shape they may be, ever came into the personal possession, custody or control of the defendant. 3rd. Because, if they are in the defendant's

Walton v. Walton.

possession, the action should be against her personally, and not as representative of the estate of William B. Walton, deceased.

It may and must be conceded, that William B. Walton, as executor of Jonathan Walton, had a right to the possession of the assets, a right to convert them into money, and a right, up to the period of his death, to appropriate them to all legitimate purposes of administration of the estate. But this latter office he did not perform; and if he had converted a portion of the assets into money, he had only partially administered those assets; and assets are unadministered, in the sense of the law, until the whole work of administration upon them is consummated. Administration of assets implies such a complete disposition of them as not only to collect them from the debtor of the estate, if they are in that condition, but finally to place them in the hands of the creditor, legatee or distributee to whom, after undergoing the process of administration, they finally belong. As before stated, they had not undergone this latter process; and we are obliged, in the state of facts in which the parties have presented the case to us, to assume that the assets required further administration.

While, then, it might safely be conceded that William B. Walton might rightfully retain the assets in his hands, even up to the period of his death, for the purpose of paying debts, legacies, and distributive shares, that right ceased at his death. It did not devolve upon his executor, but upon his successor in the trust; it did not go to the defendant, but to the plaintiff. The plaintiff, and not the defendant, succeeded him in the administration of the estate of Jonathan Walton.

The state of the assets at the death of William B. Walton, as developed in the schedule annexed to the plaintiff's complaint is properly classified in the defendant's points under three several heads.

1st. Monies received by William B. Walton, as executor of Jonathan Walton, received in payment of bonds, notes and other demands, belonging to the said Jonathan Walton at the time of his death.

As to these I have already expressed the opinion that they were only partially administered; that they were still, in the eye of the law, considered in connection with the admitted al-

Walton v. Walton.

legations in the complaint, unadministered assets, that in the latter character they necessarily passed, or rightfully would pass, into the legal custody and control of the plaintiff.

2nd. Two bonds and a note, executed by the said William B. Walton, to the said Jonathan Walton in his lifetime, or the amount thereof.

It does not expressly appear whether these had or had not been converted into money. If they had not been, the plaintiff was clearly entitled to the securities themselves, as a portion of the unadministered assets of Jonathan Walton. If they had been converted into money, then they are placed in the same category with the other partially administered assets above referred to, of the same estate.

3rd. Real estate bid in by William B. Walton, as executor of Jonathan Walton, deceased, on a foreclosure by William B. Walton, as such executor, of a mortgage executed on said real estate to Jonathan Walton; such real estate, subsequent to such bid, being occupied by William B. Walton at the time of his death, and by the defendant, as his executrix, subsequently, and being still occupied by the latter.

This purchase was necessarily, in judgment of law, as it appears to have been according to the intention of the purchaser, a purchase for the benefit of the estate of Jonathan Walton. Such estate, or its legal representatives, would have a right to elect to take the benefit of such purchase, or to hold the purchaser responsible for the value of the property, or the amount of the investment. Such election has not been made. And the plaintiff, through the instrumentality of the court, has a right to hold the estate of William B. Walton accountable in some one or other of these modes for this property, and to require an account of the moneys due on the mortgage securities, an account of the rents and profits, and of the value of the estate.

Whether, therefore, we regard the assets in their unadministered form as charged in the body of the complaint, or in their partially administered condition as set forth in the schedule appended to the complaint, there seems to be abundant aliment for such account as is demanded by the complaint in this action.

It is objected that there is no allegation in the complaint

that these assets ever came into the possession of the defendant. It is not necessary there should be. It is sufficient that they were in the hands of William B. Walton, unadministered, at the time of his death. That makes his estate liable to account for the same. The defendant is the representative of that estate, and as such the proper party to answer such a charge. But I think the legal presumption without an express allegation is that the property in the possession of William B. Walton, at the time of his death, passed into the hands of his executrix, and that if, in fact, it be otherwise, it is with her to rebut that legal presumption by an express allegation to that effect in the answer to the complaint. Further than this, it expressly appears therein, by the schedule annexed to the complaint, that she is in possession of them as his executrix of the real estate bid in on the mortgage foreclosure, and there is, therefore, a portion of the property for which she is liable to account.

3rd. It is further objected that the plaintiff's remedy, if available against the defendant at all, is so only against her personally, and not as executrix of the will of William B. Walton, deceased. This is not an effectual answer to the whole complaint for two reasons. 1st. Because as to such property as was in the hands of William B. Walton unadministered at the time of his death, his estate, and consequently the defendant as executrix, is liable for it. If, therefore, the defendant did not come into possession of the property, the estate, and consequently herself as its representative, is responsible for it as being in the possession of William at the time of his death. If it did pass into her possession as executrix, there is an increased propriety that as such executrix she should be accountable for it. This is sufficient to show that as to some portion of these assets she is properly prosecuted as executrix.

Whether as to other portions of them, for example, goods and chattels, bonds and securities, which are in her hands in specie, in the same condition in which they were at the death of Jonathan Walton (if there be any such) she may not be liable for them individually, it is not necessary to determine. I think, however, she would also be liable for them in her representative capacity, for she recovered them as such, she holds them as such, she claims them as such. As to real estate, the

Gillies v. Lent.

charge in the complaint is that she is in possession of it as executrix of William B. Walton, deceased ; and so far it seems to be manifestly proper to hold her to account in her representative character.

I, therefore, regard the action as properly instituted, and the complaint as showing a good cause of action. I think the judgment of the special and general term of the supreme court should both be reversed with costs, and judgment should be given for the plaintiff on the demurrer, with leave to the defendant to withdraw the same and answer on payment of costs.

SELDEN, J.,—dissented.

GILLIES *against* LENT.

New York Common Pleas ; General Term, November, 1865.

ACTION AGAINST MARRIED WOMAN.

An action lies against a married woman carrying on business in her own behalf, to recover damages for injuries sustained by the negligence of her servant.

Under the married women's acts authorizing a wife to carry on business, with all the incidents and rights of property, the husband is not liable either on her contracts or for her negligence ; but actions for such causes are to be brought against her, and the judgments enforced against her separate estate.

Appeal from a judgment.

This action was brought to recover damages for injuries sustained by a horse belonging to the plaintiff, by reason of the negligence of the defendant's servant in managing and driving a stage owned by her.

The complaint alleged that the defendant was the proprietor and owner, and engaged in the business of operating a certain line of stages or omnibusses in the city of New York ; and then

Gillies v. Lent.

set out the injury complained of, as occasioned by the driver of one of defendant's stages.

The answer admitted the allegation of the defendant's ownership of the line of stages, and that she was engaged in business, as charged in the complaint; and after denying any knowledge of the injury complained of, set up the following as a distinct defence.

"3rd. This defendant avers that she is 'married, and her husband living.'"

To this part of the answer the plaintiff demurred, on the ground that it did not constitute a defence to the action.

The demurrer was argued at special term before Judge CARDOZO, who overruled the same, solely on the supposed authority of the unreported case in this court, of *Miller v. Lent*.

From the order overruling the demurrer the plaintiff appealed.

William F. Shepard, for appellant, in support of the demurrer.—I. Since the acts of 1860 and 1862, relative to married women, they are clearly liable for injuries such as are complained of here, occurring in the course of, and resulting from their sole and separate business. These laws confer upon married women certain rights and privileges, which they did not before possess, and when new rights are conferred, as a consequence, all attendant obligations, responsibilities and incidents go with them. Concurrent with the right to carry on a business, is the obligation to carry it on in a skillful and careful manner, or to suffer the penalty. There is a distinct analogy between this case and other cases decided under these statutes. These statutes do not in express terms empower a married woman to make contracts apart from her separate property, yet the courts hold that by empowering a married woman to carry on business on her own account, the statute necessarily empowers her to make contracts and contract debts in that business (*Young v. Gori*, 13 *Abb. Pr.*, 13, *note*; *Klen v. Gibney*, 24 *How. Pr.*, 31).

II. The right to conduct such a business as is carried on by this defendant includes the right to employ the necessary servants and agents. Hence, the legal relation of master and servant is created; and the liability of the master for the acts of

Gillies v. Lent.

the servant must attach. "The responsibility of the master grows out of, is measured by, and begins and ends with his control of the servant" (1 *Parsons on Contracts*, 87, and note).

III. Since the above acts the husband cannot be held liable for such an injury as is here complained of. The effect of the law is to take the married woman out of the presumed authority and control of her husband, in respect to her separate business.

He has no control over the business—he cannot prevent his wife's engaging in it. The law cannot stultify itself by holding a man responsible for the proper conduct of a business, over which, in the same breath, it declares he has no possible control. The presumption of the authority and coercion of the husband over his wife is only *prima facie*, and like other presumptions, may be repelled (*Wagener v. Bill*, 19 *Barb.*, 321). This presumption is clearly repelled by the statute itself.

IV. But the injury complained of is not such a tort as the law would hold the husband responsible for. It was committed by a lawful servant of the wife, in her lawful business, who in no sense is the servant of the husband.

V. The reasonable construction of the acts of 1860 and 1862 is, that, in all matters relating to or growing out of her separate business, and all obligations and duties incident thereto, a married woman occupies the same position, and is under the same responsibilities as a man (*Young v. Gori*, 13 *Abb. Pr.*, 13).

VI. If the defendant is not liable for this injury, no one is, as the husband clearly is not liable.

W. C. Carpenter, for respondent.

BY THE COURT.—DALY, F. J.—The defendant, a married woman, is the proprietor of a line of omnibusses, and is engaged in the business of running them in this city. The action is brought against her to recover damages for a collision caused by the negligence of the driver of one of her omnibusses, and the point presented is whether the action will lie. I cannot see why it will not.

A married woman is now allowed to carry on any trade or business upon her sole and separate account, the earnings of which are her separate property, to be used or invested by her in her own name (*Laws of 1860*, p. 157, § 3). No bargain or

Gillies v. Lent.

contract entered into by her in the carrying on of any such business is binding upon her husband, or can render him or his property in any way liable. She may sue or be sued in any matter relating to her separate property, the same as if she were unmarried. In an action brought by or against her in her own name, neither her husband nor his property is liable for the costs, and she may be sued in any of the courts of this State, and if a judgment is rendered against her, it may be enforced by an execution against her separate property in the same manner as if she were unmarried (*Laws of 1862*, p. 343).

It is very plain from these provisions in the statute that it was the design of the legislature that a married woman might carry on any trade or business with the same advantages as any other person, and if she is to have all the rights and advantages of those who engage in business, she must be subject to the liabilities which are incident to the enjoyment of these rights.

A married woman carrying on a business like that conducted by the defendant, has the selection of her own drivers, servants and agents, and must be responsible for their want of skill or negligence in the conduct and management of her business, the same as any other other proprietor would be. She may, says the statute, be sued in the same manner as if she were sole, in all matters having relation to her sole and separate property. The business which the defendant conducts is her sole and separate property, for her husband has not in virtue of his marital relation any interest in, right to or control over its management, and an injury caused by the unskilful or negligent way in which the defendant's business is conducted is a matter having relation to her separate property.

A married woman was always answerable for her tortious acts, and might be charged in execution conjointly with her husband (*Solomon v. Waas*, 2 *Hilt.*, 179). Her husband had to be joined with her, for husband and wife were then regarded in the law as but one person. She was then incapable of entering into any contract, or of incurring any liability in trade or in business, but if she engaged in any business it was in law the business of her husband. The right of property was in him, the legal control and management of it belonged to him, and he alone would have been answerable for injuries arising from negligence in the management of it.

Matsell v. Flanagan.

The law is now changed. The wife may carry on business with all the incidents and rights of property. The husband is not liable for any bargains or contracts she may enter into to carry it on, nor is he answerable for a liability arising from the unskillful or negligent manner in which it is conducted. There is no reason for making him a party in such an action. It is to be brought against the wife, and in the event of the recovery of a judgment, it may be enforced against her separate property in the same way as if she had no property.

I think the demurrer, therefore, was well taken, and that the judgment should have been for the plaintiff.

CARDOZO, J.—I entirely concur with Judge DALY. The views he expresses are the same which I entertained at special term, but I did not feel authorized to disregard the decision of the general term of this court in the case of *Miller v. Lent*, decided in June, 1863, which is not consistent with any other judgment than that pronounced by me at special term.

Order appealed from reversed.

MATSELL *against* FLANAGAN.

New York Common Pleas; Special Term, January, 1867.

INJUNCTION.—TRADEMARKS AND SIGNS.—PARTIES.—JOINDER OF DEFENDANTS.

A court of equity will protect a person in the use of a trademark, *e. g.* the name of a newspaper,—although the name adopted is one that belongs to the language of the country, and may be employed in any way or for any purpose, which will not defraud individuals or deceive the public. The doctrine of the protection of trade-marks does not depend entirely upon invasion of individual rights, but upon the broad principles of protecting the public from deceit.

Matsell v. Flanagan.

Where the plaintiffs had long published a newspaper entitled: "The National Police Gazette"—*Helä*, that a preliminary injunction should be granted in an action to restrain the defendants from continuing the publication of a paper, entitled the "United States Police Gazette," and printed in a way actually to deceive purchasers and readers.

In an action to enjoin the violation of a trademark, persons who are not the publishers or makers of the infringing article, and who are engaged as the vendors thereof, may be joined as defendants with the former. The acts of both parties are to be regarded as kindred, and both wrong-doers may be joined in one action.

It is enough to support an injunction against several persons, that particular acts of fraud, kindred in character, are charged against them.

Motion to dissolve an injunction.

This action was brought by George W. Matsell and William Mackellar against P. J. Flanagan and — Finch, composing the firm of Flanagan & Finch, William D. Bancker, Thomas W. Timpson, Samuel Yates;—Dickerson and John Doe, composing the firm of Dickerson & Co., Philip Dwyer, Wm. Simpson, and — Sharp. The complaint alleged that the plaintiffs were and long had been, the publishers and proprietors of the "National Police Gazette," which was commonly known to the public as the "Police Gazette." That the defendants had wrongfully prepared and published a newspaper, in imitation of the plaintiff's newspaper, with nearly the same title and device, which misled and deceived purchasers. That the defendants Flanagan & Finch, Bancker, Timpson, Yates, Dickerson and Doe, composed several firms of wholesale dealers in newspapers and periodicals, selling the infringing paper to retail dealers throughout the country, and, that the defendants Dwyer, Simpson & Sharp, were retail dealers in the city of New York who offered the infringing paper for sale there.

The plaintiff's demanded judgment against the defendants that they and their servants and agents be forever enjoined and restrained from preparing, publishing, and selling or offering for sale any such paper.

Upon the complaint, and affidavits going to show that the paper published under the title of the "United States Police Gazette," was calculated to be, and had frequently been mistaken by purchasers and dealers for the plaintiffs' paper, the plaintiffs obtained a preliminary injunction pursuant to the prayer of the complaint.

Matsell v. Flanagan.

The defendants now moved to dissolve this injunction.

Luther R. Marsh, for the motion.

Elbridge T. Gerry, opposed.

BY THE COURT.—BRADY, J.—It may be conceded that the plaintiffs have no exclusive right to the name which they have adopted for their paper; that in the words used by them no person has any exclusive proprietary interest; that they belong to the language of the country, and may be employed in any way or for any purpose which will not defraud individuals or deceive the public. The courts in exercising the power which they possess of restraining the use of another's trade mark, symbol, name or design, do not confine their interference to names, symbols, marks or designs, originating with the person first using them, and intended either to describe a quality assumed to be a distinguishing one of the goods manufactured or the thing created, or to distinguish the particular manufacture from others. The enforcement of the doctrine that trade marks shall not be simulated, does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols, in such manner as may deceive them, by inducing or leading to the purchase of one thing for another. It is not necessary, therefore, to the exercise of judicial powers that the plaintiffs should have any other property in the name used than that possessed by any other person.

The employment of words or names in common use may be adopted by various persons in the same business, employment or manufacture, in competition of trade or business, and be encouraged by all the attributes of courts and communities, but such use must be independent and free from the charge of deceitful simulation. There is neither honesty nor honorable competition in adopting, for a similar purpose, a name used by another, if it be employed in such a manner that the public may be imposed upon, and such a result must follow if the simulation be so successful that one article or creation is purchased or accepted for another. The adjudged cases both in England and in this country, bearing upon this subject, establish these

Matsell v. Flanagan.

principles. The following are cited for illustration (*Craft v. Day*, 7 *Beav.*, *Hogg v. Kirby*, 8 *Ves.*, 214; *Knott v. Morgan*, 2 *Keen*, 219; *Crawshay v. Thompson*, 4 *Man. & G.*, 357; *Brooklyn White Lead Co. v. Masury*, 25 *Barb.*, 416; *Lemoine v. Gauton*, 2 *E. D. Smith*, 343; *Amoskeag Man. Co. v. Spear*, 2 *Sandf.*, 599; *Corwin v. Daly*, 7 *Bosw.*, 222; *Partridge v. Menck*, 2 *Sandf.*, 622; *Coats v. Holbrook*, 2 *Sandf.*, 586; *Williams v. Johnson*, 2 *Bosw.*, 1).

A newspaper establishment is not excluded from the advantage of these rules. It is a species of property, and the rights which appertain to it, so far as they are private and exclusive, are entitled to the protection of the laws (*Snowden v. Noah*, 1 *Hopk.*, 351; *Bell v. Locke*, 8 *Paige*, 74). The title of a newspaper may be a purely original one, and the proprietor for that reason entitled to its exclusive use. He may create a word, or combination of words, for the particular designation of his paper, and in that way acquire an exclusive right to the use of the name employed. He may combine, as the plaintiffs have, well known English words in common use, to designate his paper, and its contents may in many respects be multiplied by publications in other prints, but the paper will, nevertheless, be original in some, if not in many respects. The individualities of editorial life are as rarely duplicated as those displayed in other pursuits; and the intellectual vigor distinguishing the character and value of different prints, though equal in power will be essentially different in thought—in the principles announced and advocated, and in the reasoning by which the same theories are advanced and sought to be established. A newspaper in its commanding elements is the result of mental labor, and should be protected to the same extent, at least in the use of symbols, names and marks as any other property. It may be that, as it changes from day to day or week to week, and is more or less re-created by each publication, becoming as it were the mirror as well as the chronicler of the times, it is better entitled to such protection by reason of its multiplied originality. It follows, from these conclusions, that the question which first presents itself, is whether the plaintiffs have acquired any rights in respect to their paper, which the defendants have in any way violated. It appears that the plaintiffs' paper is called the "National Police Gazette." The title is a

combination of well known and familiar words. Gazette is a word of ancient standing, in its application to a newspaper. Gazetta, is said to have been a Venetian coin, which was the price of the first newspaper, and hence the name. The first Gazette was published at Oxford in 1665, and on the removal of the court to London the title was changed to the London Gazette (Webster's Dictionary, unabridged). It also appears that the plaintiffs' paper has been published weekly under that name for many years in this city, that its circulation is large and valuable, and that it was the only Police Gazette *eo nomine* published in the United States at the time of the publication of the paper complained of by them, and the only one published in this city. That the exception mentioned was of a Police Gazette of local circulation, published in California.

From these facts it is apparent that the plaintiffs have acquired a right connected with the publication of a newspaper called the National Police Gazette, which must be preserved against any fraud attempted to be perpetrated against them. They allege that the defendants are engaged in selling throughout this city a paper called "The United States Police Gazette," which, from its general character and appearance, is a fraudulent simulation of their paper. An inspection of that paper leads to such a conclusion. The words "Police Gazette," forming a part of its title, are printed by type similar in character to those employed by the plaintiffs for their print, and a similar imitation characterizes the general form, style, type and device of the paper complained of. It also appears that the simulation is such as to lead to no other conclusion than that it was designed to—as it did in fact—mislead the public. The inquiry for the plaintiffs' paper, under the abbreviated title of the "Police Gazette," is as natural as it is certain. Economy of labor of all kinds is a prominent characteristic of our people, and though there are many who prove to be "creatures of large discourse," the majority seek to accomplish, by as few words as possible, the object in view. It is shown, in this case, that when the "United States Police Gazette" is folded and lying upon the newspaper stands, as is usual and customary, the words "United States," which make the difference in title between the plaintiffs' paper and it, would be concealed—a circumstance which, in connection with the facts

Matsell v. Flanagan.

that the plaintiffs' paper is the established "Police Gazette" of this city, and its general resemblance to their paper, would be well calculated to mislead the public. This is not, however, left to mere conjecture. The proof shows that the "United States Police Gazette" has been received for the "National Police Gazette" by persons who desired the latter paper, and has been dealt with as such paper by express companies. It also appears that persons, much excited, have sought the plaintiffs' establishment about articles which were supposed to have appeared in the plaintiffs' paper, but had not in fact, and who seemed to be in ignorance of the existence of any other Police Gazette. It is unnecessary, however, to pursue this subject further. The plaintiffs have made out a case *prima facie*. It is enough to invoke the aid of this court that the sale of the "United States Police Gazette" may operate fraudulently to the plaintiffs' prejudice, and to warrant the continuance of the injunction until the trial. I am aware that in the case of Snowden v. Noah, (*supra*), the injunction was denied, but it was upon the ground, that though the plaintiffs' paper was the "National Advocate," and the defendant's the "New York National Advocate," no imposture upon any existing establishment, or upon the public, had been practiced, and, from the course of the defendant, none could be. His paper was an open competition, developed in such a way that the public could not be deceived. Had it been otherwise, there is no doubt that the result would have been different. If the defendant, in that case, had simulated the plaintiffs' print, and in such a way that it might readily have been accepted for the latter, the injunction would have been granted. I am also aware that in Bell v. Locke (*supra*), the Chancellor did not think the defendant's paper such a simulation of the complainant's publication as to injure the circulation and the patronage of the latter, by deceiving the public, and inducing a belief that it was in reality the same paper. It is apparent from the case, nevertheless, that if he had thought otherwise, he would have granted an injunction absolute.

It is said, however, that the defendants, who are not the publishers of the "United States Police Gazette," but the vendors thereof, cannot be united in one action, as they have been here, and that this action should fail, or the injunction be dissolved,

Matsell v. Flanagan.

because they have not been proceeded against separately. I can discover no good reason for sustaining such a doctrine. It is true that the defendants are not the publishers of the paper complained of, but as the agents by whom the mischief is done, however innocently, they cannot claim immunity from restraint. They are *tort feasors*. They are committing an injury to the plaintiffs, and doing wrong to the public. As *tort feasors*, they could be joined in one action (*Colegrove v. The New York & New Haven & New York & Harlem R. R. Co.*, 20 *N. Y.*, 492). Their acts are kindred. They sell a paper which should not be circulated in the form adopted by the publisher, the plaintiffs objecting thereto, and it would be a very harsh administration of justice if the plaintiffs were compelled to bring a separate action against each. If the acts done by them were different in character and effect, and each therefore bound to bear his individual burden, it might be otherwise considered. I entertain no doubt about the power and propriety, in an action like this, of uniting all the wrong-doers, so far, at least, as to restrain them in one action from continuing their violations of the plaintiffs' rights by similar conduct. It is enough that particular acts of fraud, kindred in character, are charged (See *Huggins v. King, &c.*, 3 *Barb.*, 616, and cases cited; *Hammond v. Hudson River Iron and Machine Co.*, 20 *Barb.*, 378; *Bewles v. Stewart*, 1 *Sch. & Lef.*, 209). Whether in this action, in the absence of any notice to the defendants to discontinue the sale of the paper complained of, the costs of this motion should be imposed upon them, although the injunction is continued, is a subject which I shall dispose of upon the settlement of the order to be entered herein.

PENNELL *against* WILSON.*New York Superior Court; General Term, October, 1864.**Again, March, 1865: April, 1867.**Again, Special Term, April, 1867.*MISTAKE.—EQUITABLE REFORMATION OF CONTRACT.—COSTS.—
DISCONTINUANCE.

A court of equity will not reform a written contract on parol evidence that it does not express the intent of the parties, unless the mistake is clearly made out, by proofs entirely satisfactory.

A mutual mistake must be shown. A mistake on one side, in the absence of any fraud on the other, does not authorize the interference of the court.

These rules applied to the case of a stipulation between vendor and purchaser, apportioning the taxes of the year.

In an action of an equitable nature,—*e g.*, to reform a contract on the ground of mistake, and for judgment upon it,—the common law rule that on reversing judgment and ordering new trial for insufficiency of evidence, the appellant is chargeable with costs, does not apply.

In such actions the question of costs is in the discretion of the court, and may be adjudicated on the final hearing.

The order for a new trial should not contain any direction respecting costs.

A plaintiff cannot be allowed to discontinue a litigated action without costs, upon a motion founded on affidavits, and without a trial of the cause.

So held, in an action for the recovery of a specific sum of money.

Where a new trial is ordered upon an appeal, the clerk cannot tax costs of the appeal, unless the order of the court contains a direction authorizing it. Under an order allowing costs of opposing motion, \$10 is taxable.

An appeal from an order allowing plaintiff to discontinue without costs may be regarded as a motion, for the purposes of determining the costs, which are accordingly \$10, and cost of printing.

I.—*October, 1864.* Appeal from a judgment.

The complaint in this action, which was brought by Mary H. Pennell against Edwin Wilson, alleged the entering into an

Pennell v. Wilson.

agreement; on July 1, 1863, between the plaintiff and defendant, for the sale and purchase of a house and lot of land in this city; that the agreement provided for the payment of \$4,000, part of the purchase, on the first day of November, 1863, when the deed was to be delivered; that it was further agreed between the parties that of the taxes which would be confirmed and become a lien on said property in the month of September, 1863, the plaintiff would pay the proportion of such taxes, from the date of the confirmation thereof, until the first day of November, 1863, and the balance thereof, or the proportion thereof from November 1, 1863, until the confirmation of the next annual taxes in September, 1863, should be paid by the defendant.

The complaint further alleged than an agreement in writing was drawn up and signed by the parties, but that said written agreement *omitted by mistake* to provide that the proportion of the taxes which would be confirmed in September, 1863, from the date of such confirmation, until the first day of November, 1863, should be paid by the plaintiff, and that the balance thereof, or the proportion thereof, from the first day of November, 1863, until September, 1864, should be paid by the defendant, but simply provided that the defendant should pay the proportion of the taxes for the year 1863, from November 1, 1863. The complaint then alleged the payment by the plaintiff of the taxes confirmed September 23, 1863, and the delivering of the deed of the premises to the defendant on the 31st day of October, 1863, and a subsequent demand for the payment of the defendant's alleged proportion of the taxes.

The relief demanded in the complaint was that the agreement, as written and signed by the parties, may be reformed, and the mistake or omission made therein, be corrected, so that the same shall conform to the actual agreement made between the parties, and that the judgment shall provide for the payment by the plaintiff of the proportion of the taxes, from the date of the confirmation thereof, until the first day of November, 1863, and that the defendant pay the balance thereof.

The defendant, by his answer, denied the making of any other agreement than such as was contained in the written agreement, signed by the parties

Pennell v. Wilson.

The action was tried by a justice of the court, without a jury.

On the trial the written agreement was given in evidence. It contained the following clause:

"And the said party of the first part agrees that, upon the payment of said sum of \$4,000, * * * that she will convey the said house and lot by a full covenant warrantee deed, free and clear of all incumbrances *except the party of the second part* to pay proportion of the taxes for the year 1863, from November 1, 1863. The deed * * * to bear date, and possession of the house * * to be given, on the first day of November, 1863."

The justice found as facts that it was agreed between the parties that of the taxes on the said lot which should be confirmed in September, 1863, the plaintiff would pay such a proportion as the time between the date of such confirmation to the first day of November, 1863, would bear to the period of a year, and that the residue of such taxes the defendant should pay.

That the attorney drew an agreement in writing, by which he intended, and which was supposed at the time to express the agreement as above set forth, but by mistake such attorney omitted to fully express in such contract, as written by him, the agreement as above set forth, in respect to such taxes, but simply provided that the defendant should pay the proportion of the taxes for the year 1863, from November, 1863.

The judgment ordered that the written contract between the parties "be reformed and modified, so that the same shall provide that of the taxes on said house and lot * * * which should be confirmed in the month of September, 1863, plaintiff should pay such a proportion as the time between the date of such confirmation, viz: the 23d day of September, 1863, to the first day of November, 1863, would be to the period of a year, and that the residue of such taxes should be paid by the defendant."

There was a further judgment against the defendant for his alleged proportion of said taxes.

The defendant appealed from the whole of the judgment.

J. W. Gerard, for the appellant.

J. E. Burrill, for the respondent.

Pennell v. Wilson.

BY THE COURT.* — MONELL, J. — A court of equity has power to give relief, where there has been a mistake or omission in a written agreement, and may, in an appropriate action, conform the agreement to the intent of the parties. In such cases, parol evidence of the agreement, or intent of the parties, is admissible, to prove that by mistake something material has been omitted; or that it contains more than was intended; or that it varies from their intent by expressing something different in substance from the truth of that intent.

These cases are perhaps the only exception to the general rule that parol evidence is inadmissible to vary or explain a written instrument (2 *Phil. Ev.*, 566). The justice was right therefore in admitting the evidence objected to by the defendant, and his exception thereto is not well taken.

Although the power of a court of equity to give relief in these cases is unquestionable, yet such power is exercised with great caution; and unless the mistake is clearly made out, by proofs entirely satisfactory, the court will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy (*Gillespy v. Moon*, 2 *Johns. Ch.*, 585; *Lyman v. United States Ins. Co.*, *Id.*, 630; *Marquis of Townshend v. Stangroven*, 6 *Ves. Jr.*, 528). The language of these cases is, that it requires the most demonstrative proof, especially against the answer denying the mistake. And the evidence must be rejected unless it is free from doubt, and clearly preponderates,—Lord THURLOW, in one case (*Lady Shelburn v. Lord Inchiquin*, 1 *Bro. C. C.*, 338), saying “it must be irrefragible evidence;” and Mr. Justice STORY, in his *Commentary on Equity Jurisprudence*, saying that relief will not be afforded “whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions” (*Story Eq.*, § 127).

The taxes contemplated by the agreement in this case, were the State, County and City tax for the year 1863, meaning the calendar year, from January 1, 1863, to December 31, 1863. These taxes were confirmed and became a lien upon the land on the 23d of September, 1863. Upon the lot in question they amounted \$283.15.

* Present, ROBERTSON, Ch. J., MONELL and GARVIN, JJ.

The dispute between the parties is, whether it was the agreement and intention of the parties, that the plaintiff was to pay the proportion of that sum which the period of time between the 23d of September and the first day of November (1 month and 8 days) bore to twelve months, and the defendant the balance, or whether the defendant was to pay the proportion which the period of time between November 1, 1863, and January 1, 1864, (two months) bore to the whole of the year 1863.

The written contract of sale and purchase was made on the first day of July, 1863. By its terms, the deed was to be delivered and possession given on the first day of November, 1863; and the premises were to be conveyed free of all incumbrances, "except the party of the second party to pay proportion of the taxes for the year 1863, from November 1, 1863." The plain construction of this clause (in view of the fact that the taxes to be paid were those imposed for the year 1863, without reference to the time of confirmation), is that the defendant was to pay the proportion of one-sixth of the amount; being the proportion which the period of time from November 1, 1863, to the end of that year would bear to the whole of the year 1863, and unless the evidence is clear, distinct and preponderating, that the written agreement does not express the meaning or intention of the parties, the latter must prevail.

The only reliable evidence on the part of the plaintiff is that of Mr. McDermot, the attorney who drew the contract. He testified that he was present at the plaintiff's house at the time the contract was drawn and executed: that the parties and himself only were present: that he asked the defendant when he would be ready to close the matter; he (defendant) stated, that he resided in New Jersey and that he wished to close the matter on the first of November. The witness says, he told plaintiff there would be a difficulty about that, as the taxes would be confirmed in September and become a lien upon the property: that if defendant wished the closing of the matter delayed until November, he must pay the taxes which would be confirmed in September. "He asked me how the taxes were payable. I told him they were confirmed every September, and that when paid the property would be free from taxes until the following September. After the contract

was drawn, he said it was not fair that he should pay taxes from September until November, as she (plaintiff) would occupy the house during that period. She said she was willing to pay the proportion of the taxes for that time." The witness said he then interlined the words, "the party of the second part to pay proportion of taxes for year 1863, from November 1, 1863."

Upon his cross-examination, the witness testified that at the time of making the contract the word "1864" was not used by any one; nor was anything said on the subject of who was to pay the taxes for the year, 1863, from January 1, 1863, to November 1, 1863. That he supposed the taxes of 1863, being paid, relieved the property until September, 1864: that he supposed the taxes were from September, 1863, to September, 1864, and that what he stated to the defendant was based upon relief from lien.

The plaintiff's evidence is chiefly a version of what *she* understood the agreement about the taxes to be. She says, however, that the defendant said he would pay all the taxes except from September to November. But Mr. McDermot testified to no such declaration or agreement.

It does not appear anywhere in the evidence, that the defendant understood the agreement to be as testified to, by Mr. McDermot, or that he assented to it. McDermot did not say to him that he was to pay the taxes from January 1, 1863, and apart from the defendant's testimony, it is evident that he did not so understand it, and that he never agreed to pay them. He undoubtedly supposed that the taxes were for the twelve months next succeeding the confirmation, else why did he object to paying from September to November when the plaintiff would occupy the house. Had he understood it, he could have objected with as much and even more force to paying from January to September, when the plaintiff had the house in her possession.

It seems to me quite clear, that there was no mutuality: that the defendant did not understand the agreement to be different from what was reduced to writing, and never assented to any other. I do not attach any importance to what took place at the time the deed was delivered. If the defendant made any admission or promise, then, it was with reference to

his previous understanding, that the tax year commenced in September instead of in January. If the case rested on the plaintiff's evidence alone, it would not, in my opinion, be sufficient to sustain this action, but the defendant not only by his answer under oath, but by his oral testimony at the trial, denies that any other agreement was made, than such as is contained in the written contract. He says, that at the interview spoken of by Mr. McDermot, Mr. McDermot said: "You have no objection to pay your proportion of the taxes. You know they are payable in advance." To which I replied, "I know nothing about taxes, never having bought property before, but that I was willing to pay proportion of taxes from November, 1863, at which time the property was to be transferred to me."

Upon the whole of the evidence, the action falls within the principle of the cases, that the allegation of mistake must be supported by proof entirely satisfactory. No doubt Mr. McDermot understood the agreement as he has testified, but the difficulty is, that he does not undertake to say that the defendant so understood it or assented to it; at any rate the case is not free from doubt, which it must be before the court should give relief.

After a careful reading of the evidence, I have not been able to find it sufficient to sustain the finding of the justice. It entirely falls short of satisfying me that the defendant (whatever may have been the understanding of the plaintiff and her attorney), agreed at any time to pay more than the proportion from November 1, to January 1. There was therefore no mutual mistake, and a mistake on one side does not authorize the interference of the court. The equity is wholly with the defendant; for it would be unconscionable to compel him, without the clearest proof of this agreement, to pay the taxes from January to July, for six months before he made his contract; and from July to November, when the plaintiff had the use and occupancy of the house.

I think the judgment should be reversed, and a new trial granted, with costs to abide the event.

ROBERTSON, Ch. J.—It is hardly necessary to quote the provisions of the statutes of this State in reference to the collection of taxes, to establish that the fiscal corresponds with the cal-

endar year (see 1 *Rev. Stat.*, 5th ed., pp. 954 to 977). Of course no part of the year 1864, forms any part of the time for which the taxes for 1863, are assessed. The confirmation of an assessment for taxes creates a lien on land, and renders them collectable, but has nothing else to do with the period for which they are assessed. Taxes are not collectable in advance : and although paying taxes for any one year, may leave the land free from the lien of a tax until the confirmation of the next year's tax, that does not make the taxes for a specified year a tax for the period between the two confirmations, which is rarely if ever an exact year. Assuming, therefore, that the parties before executing the contracts of purchase and sale in question had made an agreement, to be embodied therein, and only omitted therefrom by accident and mistake, to the effect that the defendant should pay the "balance" of the taxes for 1863, to be confirmed and become a lien on the land in September, after deducting therefrom the proportion thereof from such confirmation until the first of November following, the plaintiff would be entitled to no relief : since such balance is explained by the words "the proportion thereof from that date (November 1st) until the confirmation of the annual taxes in September, 1864 : " because such period formed no part of the fiscal year 1863, for which such taxes were levied.

The decision in this case finds as a fact an agreement between the parties, that the plaintiff would pay such a proportion of the taxes, which should be confirmed in the month of September, 1863, as the time between the date of such confirmation to the first of November, 1863, would bear to the period of a year, and that the residue of such taxes the defendant should pay. It also finds as a fact that the attorney who drew up the contract omitted by mistake to express such contract. What kind of mistake is not stated : from what it originated, or how it occurred. I think the testimony of such attorney clearly shows, that what was inserted in the contract, which is inconsistent with such agreement, was so done deliberately, and, if unintentionally, only under a mistaken idea of the law by such attorney, who acted for the plaintiff alone. The contract was originally drawn, exempting all the taxes for 1863, from the stipulation against incumbrances, and at the suggestion of the defendant, and by the assent of the plaintiff, it was altered to its

Pennell v. Wilson.

present form, solely because the defendant objected to paying taxes for the time the house was occupied by the plaintiff. Such attorney testifies that he never considered whether "taxes confirmed in 1863, related back to the first of January of that year," and that he supposed that the taxes for 1863, were for the time between September, 1863, and September, 1864. He also subsequently informed the defendant's attorney to the same effect, and directed the defendant's attention to the written contract. In his letter demanding payment he also reiterated the language of the contract, by saying "You agreed to pay the proportion of taxes from November 1st," underscoring the word "from." There is not a particle of evidence of a word being said by the defendant, or in his presence by others, of his assuming any portion of the year's tax for 1863, except as specified in the contract as drawn. At the first interview, as testified to by such attorney, the agreement was that the defendant should pay all the taxes, and at the second the charge was made for the reason before stated. We therefore have no right, in the absence of any statement to that effect by him, to assume that the defendant made the same mistake in regard to the law as plaintiff's attorney, and executed the contract in order to accomplish the effect the latter intended. The complaint charges that the agreement omitted was, that the defendant should pay the proportion of the taxes from the 1st of November until September, 1864. But the plaintiff testifies that her understanding was, that the defendant should pay the taxes from January 1st to September 23, 1863, and that the reason for it was "that he got the house so cheap," although she didn't know that anything was said on the subject.

If the law had been as the plaintiff's attorney supposed it to be, there would have been no necessity to reform the contract, in order to compel the defendant to pay the sum adjudged against him. And he certainly does not testify to any express assumption by the defendant of the proportion of the tax for the time, from January 1st to September 23, 1863. We have, then, simply the case of an understanding by the plaintiff, without anything said to that effect by any one, that the defendant was to pay such proportion, and the draft of the contract by her attorney, under the belief inconsistent with such understanding, that it would require the defendant to pay the proportion of

such tax for the time between the 1st of January and some time in September 1864, which he supposed to be embraced in the agreement. I think it plain that the plaintiff understood the taxes for 1863, which was the only thing talked about, to be for that calendar year, while her attorney understood it to be for an imaginary fiscal year extending to September 1864; and that being informed by him that at least five-sixths of that tax was to be paid by the defendant, she inferred it must have included the first part of 1863 until September; and that the only reason why he agreed to pay a tax for a house for a share of time long before he occupied it, was its low price. This seems difficult to reconcile with the alleged agreement by the plaintiff to pay the proportion of the tax between the 23rd of September and 1st of November 1863, because she occupied the house during that time, as testified to by such attorney.

A mistake of the law by the attorney of one of the parties, or a misapprehension of the agreement by the party whose attorney he was, is not sufficient to justify the reformation of a contract. Even a common mistake of the law is not enough (*Arthur v. Arthur*, 10 *Barb.*, 9). There is no evidence in this case of any complete and final agreement, except in the contract itself. By that, if the law were as was supposed by the plaintiff's attorney, the defendant would be bound to pay all the taxes paid by the plaintiff, except such part thereof as should be proportioned to the time between the first of November and the time the taxes should be confirmed in 1864. In that case the action would be prematurely brought, as regarded the payment of the money, as the proportion could not be determined until the day of confirmation should be ascertained.

I cannot therefore find any evidence to sustain any agreement by the defendant to assume any part of the taxes for 1863, except for the time after the first of November of that year: and I concur in thinking the judgment ought to be reversed, and a new trial had, with costs to abide the event.

II. *March*, 1865. Motion to amend order for new trial.

The order on the foregoing appeal having been settled, with a direction that costs be awarded to abide the event, the plaintiff moved for a re-settlement of the order in this respect.

Pennell v. Wilson.

BY THE COURT.*—BARBOUR, J.—This is an action brought to reform an agreement for the sale of lands, and was tried before a justice of this court without a jury. At a late General Term, the court, upon an appeal, directed the judgment to be reversed and awarded a new trial, with costs to abide the event, upon the sole ground that the evidence given upon the trial was insufficient to authorize such judgment, and an order to that effect was accordingly settled and entered.

A motion is now made on the part of the respondent to so modify that order as to charge the appellant with costs. It has long been the practice in this State, in cases in which judgments have been set aside and new trials directed, in actions at law, because of the insufficiency of the evidence to warrant the verdict, to charge the appellant with costs (*Jackson v. Thurston*, 3 *Cow.*, 342; *Goodyear v. Ogden*, 4 *Hill*, 104; *Bank of Utica v. Ives*, 17 *Wend.*, 501; *Ward v. Woodburn*, 27 *Barb.*, 354). No similar practice, however, ever obtained in the court of Chancery, where the entire question of costs was determined by the court upon a final hearing on the merits; nor, since the adoption of the Code of Procedure, has a like rule been extended to actions of an equitable nature.

We think that in cases like this, where the entire question of costs will be in the discretion of the court, and may be adjudicated upon the final hearing, no direction as to costs ought to be made by the general term, on awarding a new trial because of the insufficiency of the evidence.

The order in question will be amended accordingly

III. *April*, 1867. Appeal from order for discontinuance.

A motion was then made by the plaintiff at special term, for an order permitting her to discontinue without costs, which was granted; such motion was made solely upon the pleadings and proceedings in the action, and on an affidavit detailing the proceedings therein. A case, made upon the former motion for a new trial, was used as containing the evidence produced on the former trial.

From the order so made this appeal was taken.

*Present BARBOUR, MONELL AND GARVIN, JJ.

J. W. Gerard, for the appellant.

Wm. McDermot, for the respondent.

ROBERTSON, Ch. J.—Even before the adoption of the present Code, courts of law as well as those of equity, relieved plaintiffs from the payment of costs on discontinuing their actions in some cases, according to established rules, sometimes even compelling plaintiffs to discontinue without receiving them (*The People v. New York Superior Court*, 19 *Wend.*, 104). The only established cases in which such privilege was given, were those in which (1.) The plaintiff would be finally exempt from costs, as in cases of executors (*Arnoux v. Steinbrenner*, 1 *Paige*, 82), or (2.) The prosecution of the action would be rendered fruitless by matters beyond the plaintiff's reach, and occurring without his fault as when the defendant was imprisoned for crime or discharged as an insolvent (*Lachy v. McDonald*, 1 *Cai.*, 116; *Steinbeck v. Hallet*, 1 *Johns.*, 141), or had a personal privilege, relieving him from liability, such as infancy (*Van Buren v. Firt*, 4 *Wend.*, 209), or was beyond the jurisdiction of the court (*Taacks v. Schmidt*, 19 *How. Pr.*, 313). (3.) When the defendant had appeared by fraud (*Waterbury Leather Manufacturing Co. v. Krause*, 9 *Abb. Pr.*, 175), or where a decision had been reversed or land charged on the strength of which the action was brought. But no case is to be found where the whole merits were inquired into, to determine the possible ultimate escape from paying costs.

No statute seems to have given costs to a defendant upon a voluntary or compulsory dismissal of the bill, until the passage of the Revised Laws of 1813. They contained a general provision, giving costs to the defendants in such cases (2 *Rev. Laws*, 346, § 16). Yet subsequent thereto, previously established exceptions were recognized, and such recognition was afterwards adopted by the revisors in 1830, and expressly incorporated in their revision (2 *Rev. Stat.*, 613, § 1), in cases "where according to the practice of the court, costs would not be awarded against the complainant upon a decree or judgment, upon the hearing of the cause." This received a judicial construction in *Hamersley v. Barker* (2 *Paige*, 373), by the late learned Chan-

Pennell v. Wilson.

cellor of this State. He expressly declared therein "That it never could have been the intention of the legislature, to compel a court to examine and decide upon the whole merits of the complainant's original claim for the purpose of ascertaining whether he would be liable for costs at the hearing," and therefore construed such exception, as only including cases "where the complainant, *prima facie*, would not be liable for costs. A trial of all the issues in an action, upon affidavits made *ex parte*, merely to decide the right to costs, would be a startling innovation, contrary to all the practice of the court. It would lead to harassing a defendant by experiments, and to useless, if not vexatious litigation. The defendant might be compelled to defend himself twice in one action, without a similar risk on the part of the plaintiff. Both reason and authority are against any such privilege, and unless the authority of *Hamersley v. Barker* (*ubi sup.*) can be shaken by some statutory charge, its doctrine must govern in this case.

In a case formerly decided at special term in this court, sanctioned by all the justices in its conclusions (*Gallagher v. Egan*, 2 *Sandf. S. Ct.*, 743), the learned justice who gave the opinion without noticing the provision of the revised laws of 1813, before cited, stated that the provision in the revised statutes, before referred to (Vol. 2, p. 613, § 1), has been repealed, but did not state when or how. It is certainly not inconsistent with any provision of the Code, unless it be the 306th section. And if not inconsistent with that it is still in full force (§ 469). The 304th and 305th, designate the kinds of actions in which the plaintiff or defendant succeeding are to be allowed costs, but it must be only on a recovery. The 306th section leaves the allowance of costs in all other actions, meaning of course on their final disposition after trial, or otherwise, to the discretion of the court. These three sections dispose of all questions of costs on final judgment. The actions intended by such last section, are held to be those in equity (*Hines v. Myers*, 4 *How. Pr.*, 356; *Gallagher v. Egan*, 2 *Sandf.*, 742; *Wood v. Brooklyn Fire Ins. Co.*, 10 *How. Pr.*, 154; *Sunny v. Roach*, 4 *Abb. Pr.*, 16; *Eagleson v. Clarke*, 2 *Abb. Pr.*, 364; *Webb v. Daggette*, 2 *Barb.*, 10; *O'Hara v. Brophy*, 24 *How. Pr.*, 379), including of course actions of foreclosure of a mortgage (*Barton v. Cleveland*, 16 *How. Pr.*, 364). There was

therefore ample authority in the court, to grant a discontinuance without payment of costs in the case first referred to,—the action in which was to foreclose a mortgage,—if they could have done so, prior to the passage of the Code and the revised statutes.

In that case, the defendant bound to discharge the mortgage in question, offered to pay it without costs, but the original mortgagors and assessment creditor, whose judgment had been paid, insisted on being paid their costs before a discontinuance was allowed. The court held, substantially, that as they would not be entitled to any, except in case of sale and a fund brought into court, they were not entitled to prevent a discontinuance, where the right to such sale was defeated by the payment of the debt. This was in accordance with all previous decisions, and was not made upon the merits, since the plaintiff's right was acknowledged, and he could gain nothing by going on with the action. A repeal of the provision of the revised statutes already alluded to (vol. 2, 613, § 1), is not necessary to sustain such decision, and the remark of the learned judge to that effect may therefore be considered as a mere *obiter dictum*.

The repeal of all statutes establishing or regulating costs and fees of attorneys and others in civil actions, by the first paragraph of the 303rd section of the Code, only extends to restrictions upon bargains between attorneys and clients, as it is immediately followed by an express renewal of them and a declaration, that the measure of the compensation of the former should be left to the agreement of both, and that is succeeded in the same section by a provision giving what it calls costs to the prevailing party, upon a judgment, by way of indemnity for his expenses. But only upon a judgment. The whole section was evidently intended, merely to make the costs allowed in a cause the property of the party and not of his attorney, and not to repeal prior provisions as to costs except as to their amount.

But even if the provisions of the revised laws of 1813, and revised statutes before referred to had been repealed, and the discretion mentioned in the 306th section of the Code, could be exercised in regard to the discontinuance of actions as well as the determination of them, such discretion could not be prudently exercised in undertaking to anticipate what would be

Pennell v. Wilson.

the judgment of the court upon a trial by witnesses, examined *viva voce*, and subjecting the defendant to the expense and annoyance of a double trial in the action. And it never was exercised to that extent before any statutory regulation on 'the subject.

Moreover, this action was one of a legal as well as an equitable nature; the plaintiff demanded as relief, the reimbursement of a tax paid, which she claimed under the agreement if reformed. The 304th section of the Code specifies as one of the kinds of actions in which the plaintiff must be allowed costs, those which are "for the recovery of money," provided he recover fifty dollars, and the next section gives costs to the defendant in the same actions, unless the plaintiff be entitled to them. In this case the plaintiff demanded and must have recovered, if any thing, over fifty dollars on the trial of the issues, or have failed in her action, altogether. There was therefore no discretion vested in the court, as to the allowance of costs, if the case had gone on to trial.

No opinion was given on the decision of the motion, but the only reason urged before us for the right to discontinue without costs, was that it being an equitable action, the court on the trial had a discretion to exempt the plaintiff from costs. This, on settled principles, they would have no right to do. But no answer was made to the objection, that being also an action for the recovery of money, and the plaintiff therefore necessarily entitled to costs if she succeeds, she is also bound to pay them if she fails.

For both reasons the order appealed from must be reversed with costs.

The order was accordingly reversed with costs of appeal, and costs of opposing the motion below.

IV. *April*, 1867. Motion for re-taxation of costs

Defendant therefore made out a bill of his costs, and gave notice to plaintiff of the presentment thereof to the clerk of the court for adjustment. Both plaintiff and defendant appeared before the clerk, and plaintiff objected to several items of the bill, which were stricken out by the clerk.

Of the items thus stricken out, six were for the costs and dis-

Pennell v. Wilson.

bursements on the appeal to the general term, from the judgment in plaintiff's favor, and amounted in the aggregate to \$148.25.

One for costs of opposing motion to modify the first general term order,.....	\$10 00
One for costs of opposing motion to discontinue without costs,.....	\$10 00
One for costs before argument of second appeal,....	\$20 00
One for argument of second appeal,.....	\$40 00
One for printing papers on second appeal,.....	\$12 90

Defendant, on this motion for a retaxation, sought to reverse the clerk's decision in striking off these items.

Mr. McDermot, for the defendant. •

Mr. Ridgway, for the plaintiff.

JONES, J.—The defendant is not in a position at present to tax his costs. The action is still pending, no determination of it having yet been made. A new trial has been granted to plaintiff, and she may bring the cause on for trial. The order which she obtained discontinuing the action without costs having been vacated, the action stands in the same position as it did before that order was made.

These remarks apply to all the items of the bill, except the costs given by the last general term order. As to these costs, however, they are interlocutory ; and until a determination of the action, the clerk has no power to tax them, unless expressly authorized by the court.

Both these points, however, having been waived by plaintiff's counsel, and the motion having been submitted to me by them for a decision on the merits, I will proceed to so consider it.

The decision of the clerk, in refusing to allow the costs of the first appeal, was correct. The granting of the costs of that appeal rested entirely in the discretion of the general term, which ordered the new trial. That general term did not see fit to give costs ; neither the clerk nor a judge at special term, nor any general term, except on a re-argument ordered, can review that decision. It is urged that as the order of general term is silent on the subject of costs, the usual costs follow

Pennell v. Wilson.

the decision. This is not so. The subject of costs is a matter of statutory regulation. A party obtains costs only through the statute, and obtains them only in such cases where the statute gives them. Now looking at the provisions of the Code on the subject of costs, it is evident that where a new trial is ordered on appeal, costs of the appeal are not given of course to either party, but the allowance of them is placed in the discretion of the general term that heard the appeal. Being thus in the discretion of the general term, that discretion must be affirmatively exercised in favor of a party in order to entitle that party to them. If it is not so exercised, the case is one where no provision for costs to either party is made.

This is the view taken by the court in *Nelson v. De Forrest*, 6 *How. Pr.*, 413, and in *Savage v. Darrow*, 4 *How. Pr.*, 74.

For the same reason the item of costs for opposing motion to modify the order must be disallowed.

The general term on the last appeal having given to defendant the costs of that appeal, and costs of opposing motion to discontinue without costs, those costs are probably taxable, and the question is, how much these costs are?

The general term order did not specify the amount of costs. When such is the frame of the order, the full amount of the costs given by statute for the proceedings for which the court adjudges costs to a party is taxable.

Upon this rule the sum of ten dollars is taxable, as the costs of opposing the motion to discontinue without costs. The only remaining question is, as to what amount of costs may be taxed for the second appeal.

The appeal in question is from an order which in effect determined the action, and prevented a judgment from which an appeal might be taken. It therefore fell within the cases enumerated in section 349, and consequently section 307, by its express terms, does not apply. Unless the appeal can be regarded as a motion made at general term, then, although the general term gave costs, yet as the statute fixes no amount, no costs could be taxable.

But such an appeal is to be deemed as a motion made at general term, consequently the costs given are motion costs; which are ten dollars, and the disbursements for printing the

Herforth v. Herforth.

appeal papers (*Savage v. Darrow*, 4 *How. Pr.*, 74; *Nellis v. De Forrest*, 6 *How. Pr.*, 412).

On the argument of this motion, it seemed to be supposed by defendant's attorney that the decision of the general term, on the last appeal, had some bearing on the questions raised on the motion. That decision, however, was simply as to the power of the court to allow a plaintiff, before the determination of the action, to withdraw his suit without payment of costs, for the purpose of avoiding a decision whereby he might be charged with costs. It in no way touched upon the question as to the power of a judge or court, upon making a decision, to grant or withhold, by that decision, the costs of the proceedings which resulted in the decision. The two subjects are entirely distinct, and the principles relating to each are equally distinct.

It results from the views above expressed, that a re-taxation must be ordered for the purpose of enabling the clerk to add to the bill of costs, these items.

Costs of opposing motion to discontinue without costs,.....	\$10 00
Costs on second appeal to general term,.....	\$10 00
Disbursements for printing papers on 2nd appeal,..	\$12 90

No costs of this motion to either party.

HERFORTH *against* HERFORTH.

Supreme Court, First District; Special Term, March, 1867.

DIVORCE.—ALIMONY.—REFERENCE.

Where the question of alimony during pendency of suit is referred, the referee should not go into the question, whether the plaintiff or defendant were ever married, especially where that question is the only important one in the suit.

The referee cannot decide the question of marriage, definitely, upon such a reference, for his decision, if adverse to the plaintiff, would practically preclude the plaintiff from the trial of that question before the court and jury, by denying her the means to prosecute the action.

*Disapproved
34 Nov 53, 53*

Herforth v. Herforth.

Proof of cohabitation, with a recognition by the defendant, and that on many occasions and in the presence of witness, he treated the plaintiff as his wife is sufficient proof of marriage in such a case, to entitle the wife to temporary alimony.

The fact that the wife has acted inconsistently with her claim as a wife, and has even commenced suits against her husband by her former name, should not be regarded as decisive against her on the question of such allowance.

Motion to confirm report of referee.

This was an action for a limited divorce, on the ground of cruelty and desertion.

The complaint of the plaintiff alleged that since the 17th of December, 1864, the defendant, her husband, deserted her. That during the months of January, February, and March, 1864, the defendant treated her in a cruel and inhuman manner, striking and beating her, and administered powerful drugs upon her, by threats, so as to produce abortion, and that in the month of November, 1864, he imprisoned the plaintiff in a room for three days, giving her no food and almost starving her. The plaintiff alleged that the defendant was worth over \$100,000, and prayed for divorce and an allowance for her support.

The defendant in answer put in a general denial.

On the 3rd day of June, 1866, a motion was made by plaintiff at chambers for alimony and counsel fee, pending the action, which was referred to Charles Price, Esq., to take testimony thereon.

The reference lasted over three months, and the testimony taken was very voluminous. The plaintiff testified that she was married to the defendant in Magdeburg, Germany. That she came with him here and lent the defendant \$5,000 of her money. That as soon as they arrived here, he took her money and left her. That afterwards he came back to her, and on her signing a release to him of all claims, he paid her back \$2,500. That afterwards he had the marriage ceremony performed over again, in the city of New York, and lived with her a short time, during which time he treated her cruelly, and that finally he again deserted her, and took with him the \$2,500, which he had paid her on settlement.

The plaintiff had no marriage certificate nor witnesses of the marriage. She could only introduce a great deal of evidence

Herforth v. Herforth.

to show that the defendant had introduced her as his wife, had lived with her as such, and had hired rooms where he always introduced her as his wife, and she was generally known as Mrs. Herforth, among all the defendant's acquaintances.

The defendant admitted that he was worth \$100,000, and that he had deserted her, but he alleged that he never was married to her, but that she was his mistress, and to prove these facts, he put in evidence certain suits commenced by her in the name of Henrietta Schmidt against the defendant, and also a judgment recovered by the plaintiff under the last name against the defendant, in the Superior court, for \$2,963.66.

The testimony on both sides was conflicting. The following was the report of the referee: "It having been conceded that the defendant had abandoned and deserted the plaintiff, and that the defendant's pecuniary means are large and ample, the only remaining fact collaterally before me, to be determined with reasonable probability of its occurrence, is the marriage of the parties herein. The complaint alleges that in the month of January, 1863, the precise day being unknown to plaintiff, in the city of Magdeburg, Germany, the plaintiff was married to the defendant.

There has been no evidence produced before me, to sustain this allegation in the complaint. A witness for the plaintiff named John Russ, has testified that he was present at a marriage ceremony between them at No. 8 Chrystie street, in this city, and that it took place in October, 1864. The evidence of this witness is too unreliable to be depended upon.

The plaintiff has proven acts of recognition, cohabitation and general reputation, and they are relied upon as affording proof of marriage, and are deemed sufficient to entitle her to alimony. The parties herein appear to have been known to these witnesses as Mr. and Mrs. Herforth, with the exception of two witnesses, Andrew Vermmerman and Fanny Schwabe.

Zimmerman let apartments to the plaintiff and defendant, in August, 1863; she thinks the defendant gave the name of Schmidt, and says that is the name in his book. The other witness, Fanny Schwabe, knew the plaintiff and defendant when they hired of Zimmerman, and afterwards lived with them when they moved to Forsyth street, where she thinks they went by the name of Schmidt. They lived in Forsyth

Herforth v. Herforth.

street three or four weeks, and afterwards went to Harlem, where they lived under the name of Herforth.

The conflict of presumptions arising from the testimony, can be settled from the rule in such cases, that that must yield which has the least degree of probability to sustain it.

The testimony on behalf of the defendant, shows that before the plaintiff came to this country she bore the name of Henrietta Schmidt. She then admitted that she was married, and her husband kept a soap boiler, or was keeping a stand at Leipsic. In June, 1863, after her arrival in this country, she asked the witness, Joseph M. Becker, to talk to Mr. Herforth, to act right towards her, and that he ought to marry her. It is in evidence that on the 7th day of March, 1864, in the name of Henrietta Schmidt, she executed a general release to the defendant, Emil Herforth.

And it is further shown by an affidavit made by the plaintiff on the 18th day of January, 1865, in an action commenced by her in the Superior court of this city against the defendant herein, she then represented herself to be Henrietta Schmidt, living at 64 Leonard street. That she was unmarried, and alleged that the defendant had promised to marry her, and had failed to keep his promise. It does seem improbable that the plaintiff could then have forgotten the marriage at 8 Chrystie street, in October, 1864, or if such an occurrence had taken place, that she would consent to occupy a position so inconsistent as shown by the allegations contained in this affidavit.

It is admitted that the plaintiff has commenced in the Superior court, and court of Common Pleas of this county, several actions by and in the name of Henrietta Schmidt against Emil Herforth, and these actions are now pending. And it is furthermore admitted that the plaintiff herein by and in the name of Henrietta Schmidt, has recently obtained a verdict of \$2,500 against the defendant, Emil Herforth.

Are such actions compatible with conjugal relations, if these ever existed? The question for my determination is whether any alimony *ad interim* should be allowed.

After a careful consideration of the facts and circumstances, presented by the testimony taken before me, I have arrived at a conclusion adverse to the plaintiff. This being the wife's bill for a separation "a meritorious bill of complaint must be

shown, and it must at least appear that the plaintiff has good ground for bringing the suit."

In this case the presumptions in favor of the legality of the marriage, are not sustained by acts of recognition, cohabitation, and general reputation, but are rebutted by facts and circumstances, that have impressed my mind with the conviction that the plaintiff has not shown a meritorious cause of complaint, nor has she made it to appear that she had good ground for bringing the suit. The defendant's conduct has been reprehensible; the *mesalliance* between him and the plaintiff has been productive of no other fruit, but vexation and strife, the result of his own folly. In my opinion, the plaintiff is not entitled to alimony or counsel fee, during the continuance of this claim.

The motion to confirm the report, duly came on before Justice E. D. SMITH, in March, 1867. The plaintiff opposed the confirmation of the report.

Blumenstiel & Cohen, for the plaintiff, in opposition to the motion.—"Marriage is a civil contract, and may be entered into in any manner which clearly evinces the intention of the parties." Solemnization by a magistrate or clergyman is not necessary (*Ct. of Appeals*, 1862, *Hayes v. People*, 25 *N. Y.*, 390; 15 *Abb.*, 163; 24 *How.*, 452).

By the laws of this State, marriage is treated merely as a civil contract, not requiring legal forms, religious solemnization, or any special mode of proof (*Cunningham v. Burdell*, 4 *Brad.*, 313).

Any mutual agreement between the parties to be husband and wife *in præsenti*, especially when it is followed by cohabitation, constitutes a valid and binding marriage if there is no legal disability on the part of either (*Rose v. Clark*, 8 *Paige*, 574).

A marriage may be inferred from acts of recognition, matrimonial cohabitation and general reputation (9 *Paige*, 611; *Clayton v. Wardell*, 4 *N. Y.* [4 *Comst.*], 230; 2 *Brad.*, 1).

Cohabitation with declaration of the parties, that they are married, affords strong *prima facie* evidence of a marriage in fact (*Jackson v. Claw*, 18 *Johns.*, 346).

Herforth v. Herforth.

It is well settled, that marriage may be proved by evidence of acts of recognition, matrimonial cohabitation, general reputation, and declaration of the parties, *Christy Will case (Supreme Court, General Term, February, 1866; 8 Paige, 574; 9 Paige, 611; 4 N. Y., 430).*

Direct proof of a ceremonial marriage, is only necessary in prosecution for bigamy and actions for criminal conversations; in other cases it may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstance (*3 Brad., 369*).

Right of wife to testify in action for limited divorce (see *Court rule 88. Bihin v. Bihin, 17 Abb., 21; 24 How., 197*).

A denial of the marriage, but not of cohabitation nor of cruelty charged in the bill, is not an answer to the woman's application for temporary alimony (*Smith v. Smith, 1 Edw., 255*).

The referee erred in admitting the release in evidence as a bar to plaintiff's right in this action. The rule is well settled that such release must be pleaded. The referee erred in refusing to allow plaintiff's declaration in the suit of *Schmidt v. Herforth* tried in the Supreme court, to be admitted as evidence when he had ruled that her declarations in other suits were competent; if her declarations were competent in the one case they must have been in all.

The hardship is apparent when the evidence offered would have showed how through fraud she had been induced to make the very statement now sought to militate against her.

Kaufman, Frank & Wilcoxson, for defendant.

E. DARWIN SMITH, J.—It was conceded before the referee that the defendant had abandoned and deserted the plaintiff, and that his pecuniary means are large and ample. The right of the plaintiff to have a decree for a limited separation is not denied if plaintiff and defendant were ever husband and wife.

The action is therefore really prosecuted for alimony, and is defended to prevent the plaintiff from obtaining a decree providing for her permanent support by the defendant. The referee was to report, whether the plaintiff should have an allowance of counsel fee to enable her to prosecute the suit, and

Herforth v. Herforth.

for alimony pending this suit, and if so, for what amount. The referee has gone over quite a wide field, heard much evidence on the main question in the cause, whether the plaintiff and defendant were ever married, and comes to the conclusion upon the whole evidence that they were never married, and that the plaintiff is not entitled to alimony or a counsel fee, during the continuance of the action. The referee has gone further, I think, than was necessary for the decision of the question referred to him.

The question whether the plaintiff and defendant were ever legally married is the chief, and, indeed, the only real issue, in the cause. It would be hardly just that the referee decide that question definitely and conclusively upon the preliminary reference. His decision practically precludes the plaintiff from the trial of that question before the court and a jury, by denying her the means to prosecute the action. From the findings of the referee, and the evidence received and reported by him, it is, I think, quite clear that the plaintiff and defendant came to this country from Germany, some years since, in the character of husband and wife, and that they continued afterward for several years to cohabit together in that character. Cohabitation and recognition by the defendant of the plaintiff, is abundantly proven. The defendant, on repeated occasions, stated that the plaintiff was his wife, and treated her as such in the presence of many witnesses. This, I think, makes out a sufficient case for allowance of alimony pending the suit. The plaintiff has acted strangely, and done some things quite inconsistent with her claims to be the wife of the defendant. But in this stage of the case, I do not think the court should decide upon this evidence against the wife. I think no injustice can be done to the defendant by holding him to his declarations, on repeated occasions, that the plaintiff was his wife, till the question can be fully tried and fairly presented to a jury. The defendant, by his own confession, has deserted and abandoned the plaintiff, after living with her several years as his wife. If he was never legally married to her, he has then confessedly debauched and ruined her, and then cast her off without the means of support. I think he should be required to afford her reasonable means of support, until the case can be tried, and he should also furnish her with means to try fairly the issues

Herforth v. Herforth.

in the cause. He is a man of large means, and it will be nothing more than strict justice, that he defray the expense of the litigation between them, and I think, therefore, that the decision of the referee should not be affirmed, but on the contrary the defendant should be ordered to pay the plaintiff for temporary alimony, the weekly allowance of \$10, and a counsel fee to her attorney of \$250, with leave to her to make any further application to the court for other allowance, as may be proper; and it is so ordered.

DIGEST

OF

ALL POINTS OF PRACTICE

EMBRACED IN

THE STANDARD NEW YORK REPORTS

Issued during the period covered by this volume :

Viz.—34 NEW YORK; 46 BARBOUR; 2 ABBOTTS' PR. N. S.; 32 HOWARD'S PR.; and in the Amendments to the Code, and other LAWS of 1867.

ABATEMENT.

1. A suit brought by a public officer, as such, is abated by his going out of office; but the abatement is but a temporary disability, and if there is any successor the action might be revived. Hence, an injunction existing in such an action is not to be regarded as no longer in force, when the plaintiff goes out of office, but it must be set aside. *People ex rel. Wood v. Connolly, Ante, 315.*
2. Although, where two persons severally sign as sureties they may be joined in one action, the death of one of them abates the action as to him. [Rev. Stat., part 3, 386.] But if, under § 121 of the Code, the court revive or continue the action against the administrator, the action should be regarded as having been severed, and is to be carried on separately against the survivor and the administrator. *Supreme Ct., 1866, McVean v. Scott, 46 Barb., 379.*
3. In such a case the plaintiff might be required to elect which of the defendants he would proceed against; and if he does not, and proceeds to verdict jointly against both, the joint judgment must be set aside. The court cannot, upon the joint verdict, authorize separate judgments. *Ib.*
4. After the lapse of twenty years from the docketing of a judgment, it is not competent for the parties to revive it by an order entered upon a stipulation by consent. Judgment cannot be revived or renewed, except in the manner prescribed by the statute. *Thompson v. Jenks, Ante, 229.*

ACTION.

5. For the purpose of abating a nuisance, so much, only, of the thing as causes the nuisance should be removed. And, in general, where it is the wrongful use of a building that constitutes a nuisance, the remedy is to stop such use; not to tear down or demolish the building itself. [2 Hilliard on Torts, 95, 96; 25 Penn., 503; 36 Barb., 526.] *Supreme Ct.*, 1866; *Moody v. Board of Supervisors of Niagara County*, 46 Barb., 659.
6. The common law right of summarily abating public nuisances is not abolished by the constitutional provisions protecting private property. *Coe v. Schultz*, *Ante*, 193.
7. Hence, if an act of the plaintiff which is interfered with by the health officers be a public nuisance, he cannot be entitled to an injunction to prevent their interference with it. *Ib.*

NUISANCE.

ACCOUNTING (ACTION FOR).

1. Although, in general, resort should be had to the surrogates' courts to direct and control the proceedings of executors, and to require them to account, courts of equity, as a general rule, have a concurrent jurisdiction with those courts in matters of accounting, as against executors and administrators, and, in a proper case, may compel an accounting, and in such a case have a competent jurisdiction. They may award proper equitable relief controlling the conduct of the executor. *Ct. of Appeals*, 1866, *Wood v. Brown*, 34 N. Y., 337.
2. A settlement of accounts reopened by an action, where the complaint alleged that certain items were not included, and not intended to be, by the receipt given. *Supreme Ct.*, 1866, *Colburn v. Lansing*, 46 Barb., 37.

ACTION.

1. The personal liability of *stockholders*, where they are made liable, is an original liability: and an action against them is upon their contract, made by them in a qualified corporate capacity: but where the corporate capacity is not thus qualified, and the members or officers are not liable as original or principal debtors, but by reason of something imposed on them by the statute, the action must be upon the statute, to recover a debt in the nature of a forfeiture. *Bird v. Hayden*, *Ante*, 61.
2. One in whose name a business is carried on by other persons, in order to protect it and their funds against their creditors, and upon a secret agreement that he shall in fact be only their clerk, must, as between himself and them and persons claiming under them, be regarded as having the legal title to property, or the proceeds of property, intrusted to him by third persons in the course of such business; and he may maintain an action to recover from the persons thus doing business in his name whatever they convert to their own use against his will. *Paddon v. Williams*, *Ante*, 88.
3. If they have any remedy against his claim that he is the owner of the assets, it is only by an action for equitable relief, in which the rights of

ACTION.

persons dealing in good faith with him may be protected, and the sums due them be first paid. *Ib.*

4. An action will not lie to declare an executory contract, which is contingent upon performance on the part of the plaintiff, to be valid and subsisting, where no relief can be given as to the substance of the contract. *O'Reilly v. Mutual Life Ins. Co., Ante, 67.*
5. An action will not lie to reinstate a member of a mutual insurance company, whose policy the company have declared forfeited for non-payment of premiums. So far as rights of membership are concerned, the proper remedy is mandamus. *Ib.*
6. For cutting and removing crops from land, replevin, or an action in the nature of replevin, *in the cepit*, can only be brought when trespass could be maintained, and that will only lie for an injury to land when the plaintiff is in possession [3 Denio, 79; 8 Cow., 220]; and one in the actual possession of the premises, claiming them as his own, is regarded as the owner as to all the world, until after a judicial decision. The remedy of an owner out of possession is a judgment against the wrong-doer, for mesne profits in an action of ejectment, or by action of trespass after having got possession of the land. *Ct. of Appeals, 1866, Stockwell v. Phelps, 34 N. Y., 363.*
7. In an equitable action respecting the title to real estate,—*Held*, that the whole matter having been brought before the court upon the merits, and fully tried without objection, it was immaterial whether it was to be regarded as a bill to remove a cloud upon title or a bill *quia timet*; and that it was too late to object upon appeal that the case was not properly before the court, for determination upon all the questions litigated. *Supreme Ct., 1866, Fonda v. Sage, 46 Barb., 109.*
8. A mere equitable title to land does not enable the owner to maintain an action to recover possession thereto. Although the Code has abolished the distinction between actions at law and suits in equity, so far as regards forms, the rules by which the rights of parties are to be determined remain unchanged; and in an action against a stranger in possession, the plaintiff can only recover on his legal title. [2 T. R., 684; 5 East, 132; 2 John., 221; *Id.*, 84; 5 Denio, 225.] *Supreme Ct, 1862, Peck v. Newton 46 Barb., 173.*
9. Effect of indemnity against claims and suits, and of the requisites of notice to the indemnitor. *Ct. of Appeals, 1866, Bridgeport Ins. Co. v. Wilson, 34 N. Y., 275.*
10. An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this title, when the summons is delivered with the intent that it shall be actually served to the sheriff or other officer of the county in which the defendants or one of them usually or last resided; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it

ALIMONY.

kept an office for the transaction of business."* *Code of Pro.*, § 99, as amended by *Laws of 1867*, ch. 78.

ADVERTISEMENTS.

All legal notices and advertisements required by law to be published in the county of Hamilton, are to be published in the *Hamilton Republican*, printed at Gloversville, and the *Hamilton County Sentinel*, printed at Johnstown, in the county of Fulton, until there shall be a public newspaper actually printed and published in the county of Hamilton. *Laws of 1867*, ch. 162.

AFFIRMATIVE RELIEF.

In an action by a corporation whose officers had fraudulently issued many certificates of stock, the action being brought not only to remove the cloud upon the title, arising from the existence of such spurious certificates, but to adjust all claims against the corporation growing out of the frauds,—*Held*, that it appearing that the defendants were entitled to some affirmative relief against the corporation, it was competent for the court in such action to give the appropriate relief. And that it was no objection that by such a course the plaintiffs were deprived of a trial by jury, of the claims against them. *Ct. of Appeals*, 1865, N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y., 30, 46.

ALBANY.

Mayor's court of Albany abolished. *Laws of 1867*, ch. 272.

ALIMONY.

1. Where the question of alimony during pendency of suit is referred, the referee should not go into the question whether the plaintiff or defendant were ever married, especially where that question is the only important one in the suit. *Herforth v. Herforth*, *Ante*, 483.
2. The referee cannot decide the question of marriage, definitely, upon such a reference, for his decision, if adverse to the plaintiff, would practically preclude the plaintiff from the trial of that question before the court and jury, by denying her the means to prosecute the action. *Ib.*
3. Proof of cohabitation, and of recognition by the defendant, and that on many occasions and in the presence of witness, he treated the plaintiff as his wife, is sufficient proof of marriage, in such a case, to entitle the wife to temporary alimony. *Ib.*
4. The fact that the wife has acted inconsistently with her claim as a wife, and has even commenced suits against her husband by her former name, should not be regarded as decisive against her on the question of such allowance. *Ib.*

* The amendment consists in substituting the word "or" for the word "as," which was printed in the former act, and in omitting from the end of the section, the words: "But such an attempt must be followed by first publication of the summons, or the service thereof, within sixty days."

APPEAL.

AMENDMENT.

1. A statute providing that where a public officer, authorized to do an act, shall have filed evidence, &c., such evidence shall be valid, notwithstanding clerical or other defects therein, does not apply to give authority where it did not in the first instance exist. *Supreme Ct.*, 1866, *Town of Duanesburgh v. Jenkins*, 46 *Barb.*, 294.
2. It is not essential that an order requiring service of papers by mail, should be filed before the papers are mailed. The previous deposit in the mail is, at most, an irregularity, amendable at any time, by filing *nunc pro tunc*. *Barnard v. Heydrick*, *Ante*, 47.
3. Although new parties cannot be added to the action without amending the summons; and the summons cannot be amended of course, under § 172; but leave of the court to amend it must be obtained under § 173; yet, on a motion for other relief, if the notice contains the general prayer for such other relief as the court shall see fit to grant, the court may allow such an amendment. *N. Y. Superior Ct., Chambers*, 1866, *Walkenshaw v. Perzel*, 32 *How. Pr.*, 310.
4. Provision may be made in the order allowing new parties to be brought in, for the amendment of the summons and complaint, and the service of the summons upon the new parties, and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue, or it may simply allow them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct his proceedings regularly, at his own peril. *Ib.*

ANSWER.

1. In an action for libel, an answer setting up that the defendant made the publication at the request, and on the information of a third person, is bad on demurrer. *Hager v. Tibbits*, *Ante*, 97.
2. Such facts are not mitigating circumstances. The Code of Procedure has not changed the rules, as to what circumstances are mitigating. *Ib.*
3. *It seems*, that an answer alleging mitigating circumstances, must state that they are set up in mitigation. *Ib.*

PLEADING.

APPEAL.

1. Although the amendment made in 1862 to the second subdivision of section 11 of the Code of Procedure,—so as to authorize appeals to the court of appeals from orders refusing new trials, as well as from orders granting them,—does not effect a change of the principle limiting the examination of the verdict of a jury to the court in which it was rendered, and does not authorize an appeal, where there are no exceptions, and no ques-

APPEAL.

tions of law, and the only point is whether the verdict is not against or without evidence ;—yet the court of appeals, under that amendment, may entertain jurisdiction of an appeal from an order denying a motion for a new trial, made upon the ground of newly discovered evidence. *Per DENIO, Ch. J. Adams v. Bush* [No. 1], *Ante*, 104.

2. An appeal allowed to the court of appeals :—In an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, *or discontinues the action*, and when such order grants or refuses a new trial ; but no appeal to the court of appeals from an order granting a new trial, *on a case made or bill of exceptions*, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant, that if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial *on a case made or on exceptions taken*, if the court of appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant ; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render judgment effectual, may be *then and there* had in cases where such subsequent proceedings are requisite. *Code of Pro.*, § 11, subd. 20, amended* by *Laws of 1867*, ch. 781.
3. When the court at general term sends back a case for a new trial in the court below, indicating, in their judgment of reversal, the proper disposition to be made of it below, the proper practice requires a new formal appeal from the judgment recovered upon the new trial in the court below at special term, to the court at general term, and the new judgment must be reviewed by that court before an appeal lies to the court of appeals. Upon such appeal the regularity of the decision of the court at general term, in the first instance, indicating the proper disposition to be made of the case below, is not before the court of appeals for review ; but the judgment had upon the new trial, is to be considered as the judgment in the action. *Ct. of Appeals*, 1865, *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 *N. Y.*, 30.
4. An order granting or refusing an extra allowance of costs is only reviewable, if at all, as an intermediate order, on an appeal from the judgment. Such is not a final order, affecting a substantial right, within the meaning of the third subdivision of the 11th section of the Code of Procedure. *Ct. of Appeals*, 1866, *Clarke v. City of Rochester*, 34 *N. Y.*, 355.
5. The application to the supreme court, by a receiver of an insurance company, for an order to commence an action upon the facts stated in the application, is addressed to the discretion of the court, and the order of the court thereupon is final, and cannot be reviewed on appeal. This appeal does not fall within the purview of subdivision 1, of § 11. It is not a judgment in an action. Neither does it come within subdivision 2. It is not an order made in an action. It is, also, not within the letter or spirit of subdivision 3. It is not a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment. *Ct. of Appeals*, 1866, *Matter of Reeve*, 34 *N. Y.*, 359.
6. The case is not altered by a stipulation between the counsel of the parties

* The amendments consist of the insertion of the words in italics.

that the matter shall be determined as if the respondents had demurred to the complaint for want of equity, and the court had sustained the demurrer. *Ib.*

7. An order for judgment, which requires a reference and a report before a final determination of the cause, is not the subject of an appeal to the court of appeals. *Clark v. Brooks, Ante, 385.*
8. An order granting or refusing a new trial is appealable to the court of appeals; but this rule does not apply to the case of a trial of special issues, which may or may not embrace the merits of the cause. The award of such issues is a matter of practice, resting in the discretion of the court. *Ib.*
9. A final order in an action, adjudging that each party recover the same sum from the other, and that the two judgments offset each other, is a judgment from which an appeal lies by either party who considers himself aggrieved by it. *Supreme Ct., 1866, Howland v. Coffin, 32 How. Pr., 300.*
10. An appeal does not lie to the court at general term, from an order made at special term denying a motion for an attachment for disobeying an order of the court, where, under the circumstances of the case, the granting of the attachment was discretionary with the judge below. *Ackroyd v. Ackroyd, Ante, 380.*
11. Where a defendant, on being required to produce his books and vouchers, and to render an account, produced certain account-books and vouchers, but declined to render any further or other account, and the plaintiff obtained a general order to show cause why he should not be attached for contempt in not producing the required account,—*Held*, that an order denying the attachment was not appealable. *Ib.*
12. The power to grant a re-hearing cannot be arbitrarily exercised; and if the judge grants it upon insufficient grounds, it is an error, which the appellate court will correct. *Livingston's Petition, Ante, 1.*
13. When one judge of the supreme court overrules the decision of another judge, under pretext of a re-hearing, upon substantially the same state of facts, and when orders are made subsequent thereto, by which a valid settlement and final discontinuance of the proceedings are avoided, upon grounds not only false in fact, but insufficient in substance, the case involves a principle which affects the administration of justice in this State, and presents a case eminently proper to come before the court of appeals for review. *Ib.*
14. In such a case, the proceeding being of an equitable nature, the court of appeals have power to examine the whole case upon the merits, and to make such final order in the premises as it shall deem suitable and proper, in view of all the circumstances. *Ib.*
15. The rules and practice of the court have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community, and a departure from them may be ground for reversing an order appealed from. *Ib.*
16. The plaintiff, by serving a notice of argument after receiving notice of an appeal by defendant, does not preclude himself from enforcing the

ARBITRATION.

payment of the judgment, if the appeal was perfected without any stay of proceedings. *N. Y. Common Pleas*, 1865, *Arnoux v. Homans*, 32 *How. Pr.*, 382.

17. Under § 272 of the Code of Procedure, as amended by the *Laws of 1860*, ch. 459, where a judgment entered upon the report of a referee is reversed by the General Term, and it is stated in the judgment of reversal, that such reversal was made upon questions of fact, it is the duty of this court to examine the facts of the case, as well as the law, and to decide whether the judgment should have been reversed by the General Term upon the facts. The whole case, upon the facts, is presented to this court for review. [Distinguishing 19 *N. Y.*, 207.] *Ct. of Appeals*, 1866, *Peterson v. Rawson*, 34 *N. Y.*, 370.
18. An objection not taken in the court below, cannot be raised upon appeal. *Ct. of Appeals*, 1866, *Buck v. Remsen*, 34 *N. Y.*, 383.
19. On appeal from an order granting a mandamus, compelling the defendants to award a contract to the relator, which they had refused to do, the court will assume that there was no other reason for the refusal, than the reason which is stated by the judge to have been the one on account of which the relator's bid was rejected. *Supreme Ct.*, 1865, *The People ex rel. Vickerman v. Contracting Board*, 46 *Barb.*, 254.
20. Where a cause is tried without reference to any question whether the facts proved are within the pleadings, it is too late, after the decision, to raise an objection that the evidence was not warranted by the pleadings, provided it was otherwise competent. *Supreme Ct.*, 1866, *Commercial Bank of Rochester v. Shuart*, 46 *Barb.*, 371.
21. Where, upon an appeal from an order fixing the costs, the order appears to be irregular, the court may do justice to the parties without requiring the matter to be again brought up. *Williams v. Murray*, *Ante*, 292.
22. On appeals from the decrees of surrogates, the supreme court succeeds to the jurisdiction and authority of the old court of chancery. The review is in the nature of a re-hearing in equity; and the admission of improper evidence, on the original hearing, furnishes no ground for reversing the final decision, if the facts established by legal and competent testimony are plainly sufficient to uphold it. [22 *N. Y.*, 420, 421.] *Ct. of Appeals*, 1866, *Clapp v. Fullerton*, 34 *N. Y.*, 190.

ARBITRATION.

1. In a special statute authorizing arbitrations and the entry of judgments upon the awards, a provision that such a judgment shall not be modified except for fraud, collusion, or corruption (*Laws of 1862*, 605, ch. 359, § 7), does not preclude the court from setting aside such a judgment, if the arbitrators, by reason of exceeding the submission, had no jurisdiction to make the award in question. *Leach v. Weeks*, *Ante*, 269.
2. The submission of the question whether goods delivered corresponded to the sample by which they were sold, and must be accepted, does not authorize the arbitrators to award damages for a refusal to accept the goods. *Ib.*

ARREST.

1. The right of arrest in civil actions pertains to the remedy, and not to the contract; and may be taken away by statute. [11 N. Y., 281.] *Supreme Ct.*, 1866, *The People v. Waldron*, 46 *Barb.*, 619.
2. Factors or commission merchants, doing business in the ordinary way, that is, receiving property from the consignors from time to time, and making sales and collections in their own names, placing the proceeds to their own credit in their bank account, charging their commissions and payments made on account of the property, making remittances to and accepting, and paying drafts of the consignors, are not liable to arrest in an action for moneys neglected to be paid over to the consignors, on sales of their property. [Reviewing authorities.] *Supreme Ct. Sp. T.*, 1866, *Duguid v. Edwards*, 32 *How Pr.*, 254.
3. When a person is arrested without warrant, and the law requires that the person so arrested, shall be "immediately and without delay" conveyed before the nearest magistrate, it is the plain duty of the superintendent of police in New York to govern his force accordingly, and not to direct imprisonment. *Supreme Ct.*, 1866, *Green v. Kennedy*, 46 *Barb.*, 16.
4. If a defendant arrested in a civil action is prejudiced by the delay of the plaintiffs to enter judgment, and charge him in execution, he should move to compel them to do so, and cannot charge the plaintiffs with *laches* unless he has so moved. *Carter v. Loomis*, *Ante*, 295.
5. Where, however, the plaintiffs have been guilty of gross negligence in this respect, they may be required to stipulate to waive any objections to his taking the benefit of the fourteen day act, and the defendant be allowed to be discharged under that act on giving the usual notice. *Ib.*

ASSIGNMENTS.

1. An assignment of a chose in action may be valid and effectual, notwithstanding one object in making it was to enable the assignor to become a witness in the action. The intent and design of the assignor are not material, if the claim was legally transferred to the plaintiff, and if it was the intention and expectation of the parties, that the proceeds of the collection should be exclusively under his control. Any equitable considerations or legal liabilities, as to the disposition of the proceeds, do not affect the validity of the assignment. The assignee may stand as debtor for a particular sum, when collected, and still be the legal owner of the claim. [4 *Kern.*, 322; 21 N. Y., 121.] *Ct. of Appeals*, 1866, *Gardner v. Barden*, 34 N. Y., 433.
2. Of the effect of an assignment of a judgment, as a warranty of title and of the amount due. *Ct. of Appeals*, 1866, *Furniss v. Ferguson*, 34 N. Y., 435.
3. A cause of action by a banking corporation, to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of the banking association, is assignable, equally as if it were a cause of action by an individual. The attribute of assignability is not confined to

ATTACHMENT.

rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons. *Supreme Ct.*, 1866, *Grocers' National Bank v. Clark*, 32 *How. Pr.*, 160.

4. Right of a volunteer to bounty,—*Held*, assignable, and the claim available by the assignee. *Supreme Ct.*, 1866, *Carver v. Creque*, 46 *Barb.*, 507.

ASSIGNMENTS FOR BENEFIT OF CREDITORS

1. The rule that since the statute requires assignments for benefit of creditors to be acknowledged, an assignment cannot be executed by an attorney in fact, does not preclude the partners who remain, after one of their number has absconded, from executing an assignment of the assets of the firm. *National Bank v. Sackett*, *Ante*, 286.
2. An assignment for the benefit of creditors must substantially and fully comply with the provisions of the act of 1860. *De Camp v. Marshall*, *Ante*, 373.
3. An assignment may be set aside if the schedule omits a part of the property, although only for the purpose of diminishing the amount of security to be required from the assignee; or if it directs a larger payment to a creditor than is actually due him. *Ib.*
4. Although a creditor holding collateral security is entitled, after the debtor makes a general assignment for the benefit of creditors, to enforce the collaterals, and also claim a dividend under the assignment until his debt be fully paid, yet in computing the amount of the dividend, the claim of such creditor must be taken as reduced by the amount which he has received under the collaterals. *Midgeley v. Slocomb*, *Ante*, 275.
5. In such cases the court cannot order a sale of the collaterals which are uncollected, but only the interest of the debtor in them. *Ib.*
6. In what cases assignees are personally liable for rent upon a lease. *Supreme Ct.*, 1865, *Jermain v. Pattison*, 46 *Barb.*, 9

ATTACHMENT.

1. The Code does not authorize an attachment in an action for a tort,—*e. g.*, an action for assault and battery. It was not intended by §§ 227 and 229, to extend the remedy by attachment to cases other than those specified in the Revised Statutes. *Supreme Ct.*, 1866, *Saddlesvene v. Arms*, 32 *How. Pr.*, 280.
2. To attach a debt due to the defendant in the attachment, the notice served on the debtor must specify the debt. *Harman v. Remsen*, *Ante*, 272.
3. A notice in general terms, referring to all debts and property of the defendant, is not enough to give the attaching creditor priority over subsequent proceedings of other creditors. *Ib.*
4. Where a bailee of goods refused to deliver them up to the bailor on demand, for the reason that they had been attached by the sheriff as the property of a third person, under a claim that the bailor's title was held by him in trust for, and in fraud of the creditors of such third person,—*Held*, that if this claim proved unfounded, the refusal to deliver the goods

ATTORNEY AND CLIENT.

was sufficient evidence of a conversion of them by the bailee. [Reviewing many authorities.] *Ct. of Appeals*, 1866, *Rogers v. Weir*, 34 N. Y., 463.

5. A creditor, by attaching property in the possession of his debtor, acquires a specific lien upon his interest, and is entitled, like a judgment creditor, to impeach the colorable title of a fraudulent mortgagee. [26 How., 75.] *Ct. of Appeals*, 1866, *Frost v. Mott*, 34 N. Y., 253.
6. After verdict and judgment in an action in which an attachment has been issued, the surety in the undertaking, given on issuing the attachment cannot, when he is sued thereon, contradict the recitals in the undertaking by showing that no application was really made for the discharge of the attachment, and that no attachment was really issued in the action. It was not essential to the validity of the undertaking, that the plaintiff should compel its execution by actually suing out an attachment and making a levy. It was competent for the parties to the action to waive, if they chose, the issuing of an attachment and a seizure of property under it, and for the defendant to give, and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied. It is enough that the undertaking is binding between the principal parties, under such circumstances, to hold the sureties. *Ct. of Appeals*, 1866, *Coleman v. Bean*, 32 How. Pr., 370.
7. It would be otherwise in the case of an attachment, which was void for want of jurisdiction of the subject matter. *Ib.*
8. The buyer of chattels cannot defend an action against him for the price, on the ground that the plaintiff took the chattels from a third person, in fraud of the creditors of such third person, and that such creditors attached the money due from the defendant to the plaintiff in an action brought against the plaintiff, and that the defendant had paid such sum over to the plaintiff upon the execution in that action. Although the purchase by the plaintiff was fraudulent and void as respects his creditors, the debtor and the plaintiff have no standing in court to litigate this question. *Supreme Ct.*, 1866, *Campbell v. Erie Railway Co.*, 46 Barb., 540.

ATTORNEY AND CLIENT.

1. The rule that transactions between attorney and client, by which the former is benefitted, will be set aside upon an action brought for the purpose, unless clearly shown by the attorney to have been either just and fair, or purely voluntary on the part of his client, applies to every relation which pre-supposes an ascendant or controlling influence by one party on the mind of the other. (Per SELDEN, J.) *Mason v. Ring*, *Ante*, 324.
2. So long, however, as the influence exists, the rule applies, although the strict technical relation may have terminated. *Ib.*
3. A deed or instrument, given in such case as a compensation for services rendered, will, however, be allowed to stand as security for what is actually due. *Ib.*

BAIL.

4. The negligence of the attorney, who is the creditor in such a case, in making his entries of charges against his client, and the loose state of his accounts, though these raise a presumption against his claim, are not conclusive. *Ib.*

Compare *Nesbitt v. Lockman*, 34 N. Y., 167.

ATTORNEY-GENERAL.

In every case where security is given on requirement of the attorney-general, as a condition of bringing an action by him, on the relation or information of one having an interest in the question, the measure of the compensation to be paid by such person or persons to the attorney-general, shall be left to the agreement of the parties express or implied. *Code of Pro.*, § 434, last clause, added by *Laws of 1867*, § 16.

AUCTIONS.

1. Under the statute "of sales by auctioneers" (1 *Rev. Stat.*, 528), an auctioneer is entitled to no compensation for his services in the matter of a sale which he is employed to make, except two and one half per cent. on the amount of the sale made by him, unless a written agreement for more be previously made. *Leeds v. Bowen*, *Ante*, 43.
2. The services mentioned in the statute, for which two and one half per cent. is a compensation, are not merely the actual offering the goods for sale, and striking them off, but include also the duties incidental thereto, customary and necessary to secure a successful sale. *Ib.*
3. An auctioneer who is employed to sell a stock of goods upon an oral agreement for a compensation greater than two and one half per cent., and who is stopped, after selling a part, by the employer countermanding the sale, is not entitled to recover commissions at the rate agreed, on the value of the whole stock of goods. *Ib.*

BAIL.

1. Where a person is indicted for crime before his arrest, a police justice or a justice of the supreme court has no power to let him to bail during the session of the court having jurisdiction to try the indictment. *Babcock's case*, *Ante*, 204.
2. The court of sessions are not authorized, upon such an indictment and arrest thereon, to send the case to a police justice for examination; and an order assuming to do so does not affect the question of power to bail. *Ib.*
3. Of the right to be admitted to bail in criminal cases. *Ib.*
4. Bail taken on the arrest of a defendant, may maintain an action against a sheriff for a false return, subsequently made by him, of *non est inventus*, after he has permitted a negligent escape. Bail are connected with the action, and are privies to it in a certain sense. They are responsible for the payment of the debt, if the defendant does not pay it or render himself in execution, and the remedy against them depends upon the sheriff's return upon an execution against the body of the principal. The bail,

CARRIERS.

therefore, have the highest interest in the proper discharge of his duty by the sheriff; and the sheriff must owe them a duty in this connection. A false return by him, which charges the bail, affects them, rather than the plaintiff in the execution. In an action against the bail, the sheriff's return of a "*non est inventus*" would be conclusive. It would be highly unjust and unreasonable if, under such circumstances, the bail would have no redress against the sheriff for a false return. *Supreme Ct.*, 1866, *McArthur v. Pease*, 46 *Barb.*, 423.

UNDERTAKING.

BAILMENT.

ATTACHMENT, 4, 8.

BANKING.

Requisites of certificate in respect to stating location of banking house. *Supreme Ct.*, 1864, *Matter of Metcalf v. Messenger*, 46 *Barb.*, 325.

ASSIGNMENT.

BILLS, NOTES, AND CHECKS.

1. Bank checks issued and payable in the city of New York, should be presented during the same or the next succeeding day during the usual banking hours, in order to charge the drawer in case of the insolvency of the bank. A later presentment, except under circumstances excusing the delay, will discharge the drawer. *Hazeltan v. Colburn*, *Ante*, 199.
2. The fact that the payees of such a check received it as agents of third persons (also doing business in the same city), and that delay occurred in passing the check to their principals, does not excuse from making presentment within that time. *Ib.*

BOARD OF HEALTH.

1. The act of 1865, constituting the Metropolitan Board of Health, does not authorize the Board to determine what shall be deemed public nuisances; but leaves that as a jurisdictional question. *Coe v. Schultz*, *Ante*, 193.
2. That act is not unconstitutional; as contravening the provisions of the constitution respecting the establishment of inferior local courts; nor as delegating legislative powers. *Ib.*

BROOKLYN.

Proceedings for sale of lands for unpaid water rates. *Laws of 1867*, ch. 120.

CARRIERS.

Although common carriers may, by positive contract, limit their liability, they cannot do so by a mere notice, whether placed on a ticket or elsewhere, even where the notice is brought to the knowledge of the persons with whom they deal. *Rawson v. Pennsylvania R. R. Co.*, *Ante*, 220.

CAUSE OF ACTION.

CASE.

1. A party is not entitled, upon the settlement of a case, to have inserted in it a statement that it contains all the evidence which was given upon the trial, unless the object is, to move for a new trial upon the ground of a misdirection which was not the subject of an exception. *Magnus v. Trischet, Ante, 175.*
2. After an appeal has been taken to the court of appeals, and a case made and returned to the clerk of the appellate court, the court below will not entertain a motion to correct the case. The cause must be sent back for the purpose, to enable them to do so. *Adams v. Bush [No 3], Ante, 118.*

EXCEPTIONS.

CAUSE OF ACTION.

1. In the case of an illegal agreement, if the consideration to be paid is a gross sum, without the means of separating or distinguishing the good from the bad, an action will not lie. [21 Barb., 361; 34 Id., 533.] *Supreme Ct., 1866, Sanderson v. Goodrich, 46 Barb., 616.*
2. No action can be maintained in the courts of this State for damages upon a breach of a contract made here, and, in contemplation of the parties, at the time it was made, to be performed here, and which, by the laws of this State, is prohibited, and declared to be void. *Ct. of Appeals, 1866, Haviland v. Halstead, 34 N. Y., 643.*
3. Duty to restore consideration on rescinding contract for fraud. *Supreme Ct. Sp. T., 1866, Central Bank of Cherry Valley v. Pindar, 46 Barb., 467.*
4. The personal liability for debts of a corporation, imposed upon its officers who fail to perform a duty with which they are charged by the charter, is in the nature of a penalty. *Bird v. Hayden, Ante, 61.*
5. Hence, the courts of this State have not jurisdiction of actions to enforce such liability, where the charter creating it was granted by another State. *Ib.*
6. The designation, by the chamberlain of the city of New York, of the bank which is to be the depository of funds he may receive in his official capacity, does not confer any right upon the bank, and entitle it to an action for damages against another bank, which held the funds under an adverse claimant of the office of chamberlain, pending litigation as to the title to the office. *Lewis v. Broadway Bank, Ante, 93.*
7. The rule that one injured by the negligence of another cannot recover, if his own negligence contributed to the result, discussed, and its application determined in reference to injuries sustained by insufficient guards for horses on a ferry boat. *Short v. Knapp, Ante, 241.*
8. The proper terms of a charge to the jury in such a case. *Ib.*
9. Liability of public officers to action for damages resulting from neglect of duty. *Ct. of Appeals, 1866, Robinson v. Chamberlain, 34 N. Y., 389.*

COMPLAINT.

10. A husband cannot maintain an action, the essential basis of which is a tort committed by his wife. *Kowing v. Manly*, *Ante*, 377.
11. An action lies by a husband against one who has wrongfully alienated the affections of his wife, although he has not been deprived of her actual presence or service. *Supreme Ct.*, 1866, *Hernance v. James*, 32 *How. Pr.*, 142.
12. Actual possession of personal property, accompanied by an equitable interest in the plaintiff at the time of the seizure by the officer, is sufficient to maintain an action, and entitle the plaintiff to a return of the property. [6 *Seld.*, 579.] *Ct. of Appeals*, 1866, *Frost v. Mott*, 34 *N. Y.*, 253.
13. Of the cases upon which an action for an injunction against an erection which will constitute a public nuisance may be maintained. *City of Rochester v. Erickson*, 46 *Barb.*, 92.
14. The remedies proper to be pursued in case of the non-payment of rent; and for, and against whom these remedies may be enforced, in the case of leases, in fee in the manor of Van Rensselaer,—discussed and stated. *Tyler v. Heidorn*, 46 *Barb.*, 439.

ACTION; ASSIGNMENT, 3, 4; ATTACHMENT; CLOUDS ON TITLE; COMPLAINT;
CREDITOR'S SUITS; DIVORCE; SHERIFFS.

CLOUDS UPON TITLE.

An action will not lie to enjoin a sheriff from giving a certificate of sale, or a deed, of the real property of the plaintiff sold on execution against a third person, upon a judgment which has been reversed. An action to remove a cloud from title cannot be sustained, where it is apparent, upon the face of the pleading, that the facts alleged, if true, would not legally affect the title of the plaintiff. *Ct. of Appeals*, 1866, *Farnham v. Campbell*, 34 *N. Y.*, 480.

COMPLAINT.

1. An administrator appointed to administer upon the assets left unadministered on the death of the executor of a testator, may maintain an action against an executor of such former executor to recover the assets; and in such action it is not necessary that the complaint allege that the assets ever came into the hands of the defendant. *Walton v. Walton*, *Ante*, 428.
2. In an action against the owners of stock in a corporation formed under the general law authorizing the formation of corporations for manufacturing, mining, mechanical, chemical, and other purposes, to charge them with debts of the corporation, a general allegation that the corporation was formed under that act, is sufficient, without stating the particular purpose for which it was formed. The general allegation that it was formed under the statute, imports that it was formed for one of the purposes specified in the statute. *Lindsley v. Simonds*, *Ante*, 69.
3. An allegation that a business corporation, for value received, made and delivered a promissory note, sufficiently states a valid contract. It may be

CONT. MPT.

- presumed, upon demurrer, that it was done for a legal consideration, under the general powers common to such corporations. *Ib.*
4. The complaint in an action against stockholders, must allege judgment and execution unsatisfied. Alleging according to the terms of the statute, that a suit for the collection of such debt was brought against the company, within one year after the debt became due, is not sufficient. *Ib.*
 5. Although the complaint be inartificially framed to compel an accounting, if the facts stated plainly show that it is a case where the defendant should render an account, the court may compel an accounting under the prayer for general relief. *Ct. of Appeals*, 1866, *Wood v. Brown*, 34 N. Y., 337.
 6. Form of a complaint by a husband for the alienation of the affection of his wife by the defendant,—*Held*, sufficient. *Supreme Ct.*, 1866, *Hernance v. James*, 32 *How. Pr.*, 142.

ACCOUNTING, 2.

COMPROMISE.

1. A settlement of litigation, made by the guardian of infants, which is clearly just, and advantageous to the infants, is binding upon them, and a court of equity will enforce it, if clearly made for their benefit. *Livingston's Petition*, *Ante*, 1.
2. The court will not open a judgment against the city of New York, entered without irregularity, fraud, collusion or mistake, upon the report of a referee made in the action in accordance with a settlement between the parties, had in pursuance of authority given by the defendants, the corporation of the city of New York, to the comptroller. *Supreme Ct.*, 1866, *Law v. The Mayor, &c. of New York*, 32 *How. Pr.*, 385.

CONSTITUTIONAL LAW.

Constitutionality of health law. *Coe v. Schultz*, *Ante*, 193; *Cooper v. Schultz*, 32 *How. Pr.*, 107.

CONTEMPT.

1. In a proceeding to charge a party as for contempt, no intendment of material facts should be indulged in. *Supreme Ct.*, 1864, *Matter of Metcalf v. Messenger*, 46 *Barb.*, 325.
2. Where a defendant, on being required to produce his books and vouchers, and to render an account, produced certain account-books and vouchers, but declined to render any further or other account, and the plaintiff obtained a general order to show cause why he should not be attached for contempt in not producing the required account,—*It seems*, that the application for an attachment should be denied, and that the plaintiff, to enforce his demand for the account, should move for an order instructing the defendant that he had not complied with the requirement, and directing him to render a further account. *Ackroyd v. Ackroyd*, *Ante*, 380.

CORPORATIONS.

3. Where a party has been arrested upon an attachment for contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and has been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offense. *Supreme Ct.*, 1867, *Barton v. Butts*, 32 *How. Pr.*, 456.

CONTRACTS.

1. A mere state of war between the two communities in which the parties to a contract respectively resided, and the consequent inhibition of commercial relations, do not form an excuse for the non-performance of a condition precedent so as to avoid a forfeiture of the contract. *O'Reilly v. Mutual Life Ins. Co.*, *Ante*, 167.
2. *It seems*, that an exception in a condition annexed to a grant, can not by itself be construed as a positive undertaking. *Newell v. Wheeler*, *Ante* 134.

BILLS, NOTES, AND CHECKS; CAUSE OF ACTION; COMPROMISE;
MANDAMUS; STIPUTATIONS.

CORPORATIONS.

1. Of the right of voting in corporations, on stock irregularly issued. *Matter of Wheeler*, *Ante*, 361.
2. In an emergency and contingency in which the forms of procedure prescribed by the charter in respect to elections, fail to accomplish the purposes contemplated, so that the necessary offices are vacated, it is competent for the corporators themselves to exercise the power of election, and provide for the appointment of inspectors for that purpose. *Ib.*
3. An election of directors of a corporation is not invalid or to be set aside as irregular, because the oath actually administered to the inspectors was not subscribed by them. *Ib.*
4. Of the rights and liabilities of foreign corporations; and the liability of members in actions for the debts owing or the wrongs done by the corporation. *Ct. of Appeals*, 1866, *Merrick v. Van Santvoord*, 34 *N. Y.*, 208.
5. Mere subscriber not necessarily liable as a corporator for debts. *Supreme Ct.*, 1866, *Lathrop v. Kneeland*, 46 *Ba b.*, 432.
6. Of the proper method of assessing taxes upon corporations. *Supreme Ct.*, 1866, *The People v. Board of Education of Lockport*, 46 *Barb.*, 508.
7. It is a general principle that a cause of forfeiture cannot be taken advantage of, or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. [Angell

COSTS.

& Ames on Corp., p. 664, and authorities cited, in note 1; 6 Hill, 271; 7 How. Pr., 476.] *Supreme Ct.*, 1866, *Towar v. Hale*, 46 *Barb.*, 361.

ACTION, 1, 10; CAUSE OF ACTION, 4, 6.

COSTS.

1. The rule that costs will not be given to either party where the plaintiff succeeds in part and fails as to the residue, is applied only where some distinct and independent claim of the plaintiff has wholly failed [4 Johns., ch. 79; 9 Paige, 211; 11 Id., 299]; or where the plaintiff was at fault, as by having produced a mistake in fact, which occasioned the litigation. [6 Seld., 319.] But where the plaintiff makes but one claim and establishes it, except as to a small part which is cut off by the statute of limitations, a defense he is not called on to anticipate and concede at the commencement of the action, the court may in their discretion award costs to the plaintiff, if the defendants on setting up the statute did not tender or offer judgment for the amount actually remaining due. *Ct. of Appeals*, 1866, *Rundle v. Allison*, 34 *N. Y.*, 180.
2. Section 307, subd. 1, of the Code of Procedure,—fixing the amount of costs to be allowed,—amended so as to read as follows: "1. To the plaintiff, for all proceedings before notice of trial *in actions where judgment for failure to answer can be taken without application to the court*, fifteen dollars; *where judgment can only be taken on such application*, twenty-five dollars; for all proceedings after notice of and before trial, fifteen dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number, served with process, one dollar."* *Laws of 1867*, ch. 781.
3. Where a cause on the calender is postponed, not having been on for terms exceeding five, to prevent an award of costs against the party ultimately losing, a provision to that effect should be inserted in the order for postponement. *N. Y. Superior Ct. Sp. T.*, 1866, *Jackson v. Lynch*, 32 *How. Pr.*, 93.
4. Subdivision 5, of § 307, of the Code of Procedure,—which fixes the costs allowed on appeal,—amended to read as follows: "5. To either party on appeal, except to the court of appeals, and except appeals in the cases mentioned *in subdivisions one, three, four and five of section three hundred and forty-nine, and except in cases mentioned in the second paragraph of section three hundred and forty-four*, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either party before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial, on a case made and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section two hundred and sixty-five." *Laws of 1867*, ch. 781, § 13.
5. Where a new trial is ordered upon an appeal, the clerk cannot tax costs of the appeal, unless the order of the court contains a direction authorizing it. *Pennell v. Wilson*, *Ante*, 466.
6. Under an order allowing costs of opposing motion, \$10 is taxable. *Ib.*

* The amendment consists in the insertion of the words in italics, so as to increase the costs on judgment on application to the court.

COUNTIES.

7. An appeal from a order allowing plaintiff to discontinue without costs, may be regarded as a motion for the purposes of determining the costs, which are accordingly \$10, and costs of printing. *Ib.*
8. A sheriff on succeeding in his defense to an action,—*Held*, entitled to double disbursements, as well as double costs. *N. Y. Superior Ct. Sp. T.*, 1866, *Jackson v. Lynch*, 32 *How Pr.*, 93.
9. If, on settlement of a case upon appeal, the respondent makes affidavit that the stenographer's notes taken on the trial (or a portion of them) are necessary to enable him properly to propose amendments to the case, the expense of procuring such notes is a proper item of taxation in the adjustment of the costs at the general term. Whatever conduces to the better prosecution of the controversy is necessary. What prudence dictates is necessary; without it the interests of the party would be unsafe. *Supreme Ct.*, 1866, *Sebley v. Nichols*, 32 *How. Pr.*, 182.
10. Although in the New York Superior Court a notice of motion cannot be withdrawn or countermanded, without payment of the costs of the motion, yet, where a motion is noticed for *two* purposes, the moving party can withdraw the motion as to the one part, leaving it still pending as to the other, without payment of the costs of motion. *N. Y. Superior Ct. (Chambers)*, 1866, *Waikenshaw v. Perzel*, 32 *How. Pr.*, 310.
11. Where the conduct of the party propounding a will for probate, was such as to indicate probable cause for contesting the validity of the will,—*Held*, that the costs of both parties should be paid from the estate. *Ct. of Appeals*, 1866, *Clapp v. Fullerton*, 34 *N. Y.*, 190.
12. The costs upon an appeal from an order of the county court are not the costs of motion fixed by section 365 of the Code of Procedure, but are costs of an appeal from an order fixed by section 307. *Williams v. Murray*, *Ante*, 292.
13. The costs on an order made in the county court upon appeal, denying a motion to dismiss an appeal from a justice's court,—stated. *Ib.*
14. In an action in the city court of Brooklyn, only five term fees can be taxed. The practice of the city court of Brooklyn is regulated by the act organizing the court (*Laws of 1849*, ch. 102), in conformity to the practice of the supreme court. *Bird v. City of Brooklyn*, *Ante*, 132.
15. Term fees are allowed in that court; but subject to the same restrictions as in the circuit of the Supreme Court. *Ib.*

APPEAL, 4; ATTORNEY-GENERAL.

COUNTIES.

1. Compensation of stenographic reporters in certain courts of record, in the fifth judicial district, made a county charge. *Laws of 1867*, ch. 41.
2. All claims against a county must first be presented to the board of Supervisors for their allowance. And unless so presented, with proper affidavits, as required by the statute, the supreme court will not interfere in aid of the claimant, by issuing a mandamus to the board. *People ex rel. Cagger v. Supervisors of Schuylers*, *Ante*, 78.

COUNTY CLERKS.

The county clerk of the county of Kings, entitled to charge and receive for searching the dockets of judgments and decrees, and transcripts of judgments and decrees *fifteen* cents per year, instead of five as heretofore. Also for recording all papers, which by law may be recorded in his office, ten cents for each folio. *Laws of 1867*, ch. 128, amending *Laws of 1865*, 1425, ch. 713.

COURT OF APPEALS.

1. A motion for a new trial, on the ground of surprise and newly discovered evidence, is a matter of discretion, and not subject to review in this court. [29 N. Y., 635.] *Ct. of Appeals*, 1866, *Bedell v. Chase*, 34 N. Y., 386.
2. Under the provisions of the *Laws of 1854*, 592, § 1, and the *Code of Procedure*, §§ 1, 330, an appeal lies to the court of appeals from an order made by the court below, on petition in a special proceeding,—*e. g.*, an order removing a trustee. *Livingston's Petition*, *Ante*, 1.
3. In such a case, the court of appeals will examine the affidavits and evidence upon which the case was decided below. An unrestricted appeal takes with it the whole merits of the determination appealed from. *Ib.*
4. Although the court of appeals will not review the discretion exercised by the court below, where it has acted within the statute, it may do so where the court below has proceeded upon the application of parties not entitled to invoke its interference. *Ib.*
5. "4. An appeal from any order to the court of appeals affecting a substantial right, arising upon any interlocutory proceeding, or upon any question of practice in the action, may be heard as a motion, and noticed for hearing for any regular motion day of the court." *Code of Pro.*, § 11, subd. 4, (5²) added by *Laws of 1867*, ch. 781.
6. On appeal to the court of appeals upon a question of the admission of a will to probate, the court of appeals examine the case as *res novo*; and if satisfied upon the case that the judgment is correct, will not reverse it, and order a new trial from the fact that evidence had been improperly received, especially if they see that such evidence could not legitimately have influenced the result. *Ct. of Appeals*, 1865, *Gardiner v. Gardiner* 34 N. Y., 155.
7. The objection, in an action for a wrongful levy, that the form of the judgment is not according to the statute, but that it erroneously directs payment of the money in addition to awarding a return of the property, is an objection which cannot be raised in the court of appeals. It is a question of practice, which is the proper subject of an application to the special term. *Ct. of Appeals*, 1866, *Buck v. Remsen*, 34 N. Y., 333.
8. On reversing a judgment of the supreme court by which the cause had been dismissed for want of jurisdiction, the court granted costs of appeal to abide the event. *Ct. of Appeals*, 1866, *Marsh v. Benson*, 34 N. Y., 358.
9. When five of the judges do not concur, and a re-hearing of the case is ordered, the judges shall file the opinions read by them with the reporter of the court, but such opinions shall not be published. No person other than the judges of the court, the reporter of the court, or the counsel or attorney

CRIMINAL LAW.

of either of the parties to the action shall have access to, or a copy of, the said opinions, but such counsel or attorney may have access to and a copy thereof. *Laws of 1867*, ch. 781, § 3, adding this provision to *Code of Pro.*, § 14.

COURTS.

1. An act regulating the practice in the first judicial district as to holding special term and chambers. *Laws of 1867*, ch. 383.
2. An act for the employment of a stenographer in the county court, court of sessions and surrogate's court of the county of Kings. *Laws of 1867*, ch. 271.

ALBANY.

COURTS-MARTIAL.

Under the laws of 1862, ch. 477, § 220, the service of summons to appear before a court-martial for delinquency in non-payment of fines or non-attendance at parades, must be served personally, or by leaving it at the residence of the party. Service by leaving the summons at his office is not sufficient. *City Ct. of Brooklyn*, 1867, *Matter of Lockwood*, 32 *How. Pr.*, 437.

CREDITORS' SUITS.

1. Where a person, who is insolvent at the time, transfers his interest in a legacy, for an inadequate consideration, to a party who is aware of his insolvency, the creditors of the assignor may maintain a suit in equity to have their debts satisfied out of the interest or fund, beyond the consideration actually paid or agreed to be paid; even though the transaction was not in fact fraudulent, so as to authorize the court to set it aside on that ground. [1 *John. Ch.*, 478; 1 *Vern.*, 465; 2 *Bro. C. C.*, 177; *Story's Eq. Jur.*, §§ 336, 337.] *Supreme Ct.*, 1866, *Bigelow v. Ayrault*, 46 *Barb.*, 143.
2. Where a transfer of property, real and personal, is obtained fraudulently and inequitably, by false representations made by the transferee to the transferer, and by abuse of a fiduciary relationship, and the transferer makes a subsequent conveyance of his property and causes of action to the plaintiff for the benefit of his creditors, by a voluntary assignment, such voluntary assignee may maintain, in his own name, a bill to set aside the first conveyance, as having been fraudulently and inequitably obtained. [*Law Rep. Eq.*, series, 1867, p. 3, *Marsh*, p. 337, *Id.*, 528; 1 *Young & Coll. Eq. Rep.*, 481; 2 *Kern.*, 121; 9 *Wend.*, 511.] *Ct. of Appeals*, *McMahon v. Allen*, 32 *How. Pr.*, 313.

ATTACHMENT, 5.

CRIMINAL LAW.

Upon indictment, an offer to show the mental incapacity of the defendant is not admissible, unless for the purpose of proving him to be actually *non compos mentis*. *Supreme Ct.*, 1866, *Patterson v. The People*, 46 *Barb.*, 625.

INDICTMENT.

DEPOSITIONS.

DAMAGES.

1. In an action against a sheriff for levying upon plaintiff's property under an execution against a third person, the plaintiff having procured a delivery of the property in the action, a verdict in favor of the defendant upon finding the title to be in such third person, should be not merely for the amount of the execution, but for the value of the property. [7 Cow., 670; 15 Conn., 502; 13 Wend., 63; 15 Mass., 389; 2 Kern., 243; 5 Binn., 457; Sedg. on D., 506.] *Ct. of Appeals*, 1866, *Back v. Remsen*, 34 N. Y., 383.
2. Measure of damages in an action for the unlawful conversion of chattels. *Morgan v. Gregg*, 46 Barb., 183.

DEBTOR AND CREDITOR.

ASSIGNMENT FOR BENEFIT OF CREDITORS; CREDITORS' SUITS.

DEED.

DELIVERY; RECORDING DEEDS.

DEFENSES.

ANSWER.

DEPOSITIONS.

1. Section 399 of the Code of Procedure,—which authorizes the examination of parties as witnesses,—amended by extending it to examinations conditionally on commission and upon the trial or hearing. *Laws of 1867*, ch. 781, § 14.
2. Any party to a suit depending in any court of any other State of the United States, or of any foreign country, may obtain the testimony of any witness residing in this State, to be used in such suit. 2 *Rev. Stat.*, 397, § 29, as amended* by *Laws of 1867*, ch. 68.
3. If a commission to take such testimony shall have issued from the court in which such suit is pending, or if any notice to take the testimony of witnesses in this State, shall have been issued in any other State of the United States in any suit therein pending, pursuant to the statutes of said State, on producing such commission or such notice to a justice of the supreme court, or the judge of the county court of any county, and on due proof being made to such officer that the testimony of any witness residing in this State is material to the party desiring the same, such officer shall issue a summons to such witness, requiring him to appear before the commissioners named in such commission, or before a commissioner for the State in which said notice was issued and said suit is pending, or before any officer designated in said commission, or in said notice by his title of office, to testify in said suit. *Id.*, § 30.
4. Such summons shall specify the time and place at which such witness is required to attend; the place shall be within the county in which such witness resides, or within forty miles of his residence, if out of his county: and such witness shall be paid the sum of two dollars for each day of his attendance in obedience to said summons and eight cents per mile for his necessary travel in going to said place. *Id.*, § 31.

* The amendments consist of the addition of the words in *Italic*.

DELIVERY.

1. To constitute a delivery of a deed, so that it shall become effectual to transfer title to real estate from one to another, there must be an acceptance by the person to whom it is made. Acceptance by the grantee is an essential part of a delivery, in law. *Supreme Ct.*, 1866, *Fonda v. Sage*, 46 *Barb.*, 109.
2. Where a party makes a purchase of land, and the agreement is that the vendor is to convey it to the purchaser, by a deed with some special provision in it, and a deed is made and handed over to such purchaser, which conveys the land to another person, and the purchaser receives it without any examination of its contents, understanding and believing that it is a deed made to him and vesting the title in him, and retains it in that belief, until he discovers the mistake, he may return it to the vendor, and require one to be made in accordance with the agreement. No valid and effectual delivery has been made in such a case. *Ib.*

DEMAND BEFORE SUIT.

1. Where goods are delivered by mistake to one who has no right to the possession, and he, instead of endeavoring to correct the mistake, lends himself to favor it, and without authority performs services respecting them, and claims thereby a lien, he may be regarded as a wrong-doer from the beginning, and an action will lie against him without demand. *Purves v. Moltz*, *Ante*, 409.
2. Previous demand is not necessary to enable the beneficiary under a will to recover in equity the principal sum which the executor or trustee was required to pay over. If necessary for any purpose it is only for the purpose of charging the trustee with interest, and it is not necessary even for that, in the case of neglect to pay over during a long period, and the absence of proof that the executor had the money constantly on hand, ready to be paid over when called for. *Ct. of Appeals*, 1866, *Rundle v. Allison*, 34 *N. Y.* 180.

DISCONTINUANCE.

1. A plaintiff cannot be allowed to discontinue a litigated action without costs, upon a motion founded on affidavits, and without a trial of the cause. —*So held*, in an action for the recovery of a specific sum of money. *Pennell v. Wilson*, *Ante*, 466.

DISCOVERY (AND INSPECTION).

1. An application for discovery of books and papers in possession of a party, though made under the provisions of the Code of Procedure, is not to be denied on the ground that it should have been by petition instead of on motion. *Johnson v. Consolidated Silver Mining Co.*, *Ante*, 413.
2. To what extent a corporation may be required to submit its books and documents to inspection. *Ib.*

ELECTION OF REMEDIES.

DISTRICT COURTS.

In an action in the district court of the city of New York, where a defendant is arrested under subdivision 3, of § 16, of the act of 1857, for fraud in contracting the debt on which the action is brought, he may, on being brought before the justice, upon the warrant, read counter-affidavits denying the allegations in the affidavits of the plaintiff, before joining issue in the action; and if the justice refuses to receive such affidavits, on the ground that he has no power to hear them, judgment subsequently rendered may be reversed upon appeal. *N. Y. Common Pleas*, 1866, *Johnson v. Florence*, 32 *How. Pr.*, 230.

DISTRICT-ATTORNEYS.

Assistant district-attorney of Rensselaer County,—salary and fees regulated. *Laws of 1867*, ch. 150.

DIVORCE.

The act of a husband in angrily expelling his wife from home, under suspicion of her unfaithfulness,—*Held*, not sufficient to sustain a charge of abandonment as a ground for granting a limited divorce under the statute. *Barlow v. Barlow*, *Ante*, 259.

ALIMONY.

ELECTION OF REMEDIES.

1. Under the Code of Procedure, although legal and equitable jurisdictions are combined in the same tribunal, the principles of each remain distinctive and undisturbed. Whenever a plaintiff calls upon the court to exercise its jurisdiction upon principles of equity, he elects thereby his mode of trial, and waives any constitutional right of trial by jury that he might at law have demanded, both as to the remedy he seeks and the defense that may be interposed. *Ct. of Appeals*, 1865, *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 *N. Y.*, 30.
2. If a vendor who has been defrauded in the sale of his goods proceeds to judgment against the vendee, upon the contract of sale, after he is apprised of the fraud, his election is determined; and he cannot afterward follow the goods, or the proceeds thereof, into the hands of a third person, on the ground of fraud. [4 *Paige*, 537.] *Ct. of Appeals*, 1866, *Bank of Beloit v. Beale*, 34 *N. Y.*, 473.
3. In the case of a private nuisance, the aggrieved party has an election of remedies. He may remove the nuisance, or he may have his action for the private damages sustained by him. He cannot have both remedies. *Supreme Ct.*, 1866, *Griffith v. McCullum*, 46 *Barb.*, 561.

ESTOPPEL.

4. The election by the creditor to affirm the contract as to part of the claim only, is not sufficient to deprive him of the right to sue for fraud in the contract as to the remainder of the claim. *Zinn v. Ritterman, Ante, 26.*

ESTOPPEL, 4.

ELECTIONS.

CORPORATION, 1, 3.

ENLISTMENT.

HABEAS CORPUS.

ERROR.

If, upon the trial of an indictment for a statute offense, no question is made as to the construction of the statute, no ruling on the subject requested, and no exception taken to the charge to the jury, the appellate court, on a writ of error, will not entertain any question upon that point; nor is the question in respect to the sufficiency or strength of the evidence that produced the conviction raised by the writ of error. *Ct. of Appeals, 1866, La Bean v. The People, 34 N. Y., 223.*

ESTOPPEL:

1. The plaintiff in an action on a promissory note is not estopped from asserting his title to the note, by the record of a former unsuccessful suit which he, as the attorney for the payee, instituted in the name of the latter. *Wheeler v. Ruckman, Ante, 186.*
2. If such record be admissible in evidence at all, it is only as tending to show want of title in the present plaintiff; and where the evidence on this point is conflicting, it is a question which must be submitted to the jury. *Ib.*
3. There are no different rules of estoppel for officers of courts than other persons. They are not personally bound by what they state not under oath, so as to be precluded from subsequently testifying otherwise, particularly as regards third parties, except where the latter, having a right to act on the faith of such statement, have done so, and have been prejudiced thereby. (*Per ROBERTSON, J.*) *Ib.*
4. Claiming in one action to be owner of the chose in action by virtue of a specified transfer, does not preclude the plaintiff from claiming, in a subsequent action for the same cause, that he became owner by a prior and different transfer. (*Per ROBERTSON, J.*) *Ib.*

ATTACHMENT, 6.

EXECUTION.

EXCEPTIONS.

1. The first paragraph of § 268, Code of Procedure,—which provides, first, for the taking of exceptions for the purposes of an appeal, upon a trial by the court, of questions of fact; and second, for the making and settling of the case, and third, restricting the review of questions, whether of fact or of law—to the mode prescribed by the section,—amended so as to read as follows: 1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. Provided, however, that where the decision filed under section two hundred and sixty-seven does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term, and for that purpose may within ten days after notice of the decision being filed, except thereto, and make a case or exceptions as above provided in case of an appeal. *Laws of 1867, ch. 781.*
2. An exception held unavailing because not sufficiently explicit. *Ct. of Appeals, 1866, Buck v. Remsen, 34 N. Y., 313.*

EXECUTION.

1. Produce of a farm belonging to the wife and carried on by the husband, not liable to seizure on execution against the husband. *Ct. of Appeals, 1866, Gage v. Dauchy, 34 N. Y., 293.*
2. The provision of the *Laws of 1865, 1835, ch. 646, § 4*,—that until moneys necessary for the payment of any judgment against the city of New York shall have been raised by taxation, no execution shall issue on the judgment,—does not apply to judgments on contracts made before the act took effect. *Hadfield v. Mayor, &c. of New York, Ante, 95.*
3. In all cases where any sale of real estate has been or shall hereafter be made under execution, and a certificate thereof given to the purchaser, or his assignee, but no deed executed pursuant to the provisions of article second, title fifth, chapter sixth, part third of the Revised Statutes, it shall be the duty of the sheriff making such sale, and in case of his death or removal from office, of his under sheriff, to execute a deed of the estate so sold and remaining unredeemed, to any person or persons to whom such certificate shall be or shall have been duly issued, or shall be or shall have been duly assigned, or to any person who shall have duly redeemed the said real estate, other than the execution debtor, or his heirs or assigns, the executors or administrators of any deceased assignee, or of the person who shall have so redeemed the same. In case of the death or other disqualification of both said sheriff and under sheriff before any deed shall be executed, as above provided, it shall be the duty of the deputy sheriff who made the sale, or any successor in office of said sheriff, to execute said deed. Every deed executed pursuant to the provisions of this section, shall have the same force and effect as if executed by the sheriff making such sale. *Laws of 1867, ch. 116, amending Laws of 1835, ch. 189; 3 Rev. Stat., 5th ed., 657, § 91.*
4. Under the provisions of 2 Rev. Stat., 371, as amended by the act of 1847, ch. 410, a redemption by a creditor, on the last day of the fifteen months, to be valid and effectual, must be made at the sheriff's office. The statute is plain and peremptory in this respect, and cannot be disobeyed or disregarded. It is an express and positive requirement, and must be strictly

EVIDENCE.

- followed, or nothing is accomplished. *Ct. of Appeals*, 1866, *Gilchrist v. Comfort*, 34 N. Y., 235.
5. The mode of obtaining title to land sold under execution by redemption, is wholly a creation of the statute, and its provisions must be strictly followed. *Ct. of Appeals*, 1866, *Gilchrist v. Comfort*, 34 N. Y., 235.
 6. An officer who seizes all the property of a debtor, knowing that part of it is exempt, cannot justify the seizure, by the omission of the debtor to designate a particular portion of it as not subject to execution or attachment. The mere silence of the party, while an officer is stripping him of property exempt from seizure, under color of legal authority, furnishes no protection to the wrong-doer. *Ct. of Appeals*, 1866, *Frost v. Mott*, 34 N. Y., 253.
 7. Execution is not to be issued against the person, in an action which is not in form for a tort, although an order of arrest was obtained and issued, if such order was not actually served nor the defendant arrested upon it. [Code of Procedure, § 288.] *Supreme Ct.*, 1866, *The People v. Carpenter*, 46 Barb., 619.

EXECUTORS AND ADMINISTRATORS.

1. Distinction between the functions of executor and a trustee. *Ct. of Appeals*, 1866, *Wood v. Brown*, 34 N. Y., 337.
2. Duties of executors and administrators in respect to partnership in which the decedent was interested. *N. Y. Superior Ct., Sp. T.*, 1866, *Walkenshaw v. Perzel*, 32 How. Pr., 233.
3. Commissions may be refused to an executor, in an action to compel him to pay over trust moneys, if the commissions are not claimed in the answer. *Ct. of Appeals*, 1866, *Rundle v. Allson*, 34 N. Y., 180.
4. An administrator appointed to administer upon the assets left unadministered on the death of the executor of a testator, may maintain an action against an executor of such former executor to recover the assets. *Walton v. Walton, Ante*, 428.
5. It makes no difference whether such assets have been in part administered. *Ib.*
6. Effect of the provisions of 2 Rev. Stat., 83, Laws of 1842, ch. 157,—setting apart certain items of property to the widow and children,—as passing the title of them. *Vedder v. Saxton*, 46 Barb., 183.

EVIDENCE.

1. Burden of proof in an action raising the question of usury upon a contract made in one State, and secured by a mortgage on property in another. *Supreme Ct.*, 1866, *McCrahey v. Alden*, 46 Barb., 272.
2. Of the burden of proof in an action by the commissioner of highways, for an obstruction by the defendant. *Ct. of Appeals*, 1866, *Little v. Denn*, 34 N. Y., 452.

EVIDENCE.

3. Facts raising a presumption of negligence, in a passer-by, crossing a railroad track. *Ct. of Appeals*, 1866, *Ernst v. Hudson R. R. Co.*, 32 *How. Pr.*, 61.
4. Presumptions as to character, and appropriate evidence on this subject. *Supreme Ct.*, 1866, *Rathbun v. Ross*, 46 *Barb.*, 127.
5. Admissibility of entries in the books of a physician. *Supreme Ct.*, 1866, *Clarke v. Smith*, 46 *Barb.*, 30.
6. Entries in agent's books,—*Held*, not proper evidence to establish usury. *Ct. of Appeals*, 1866, *Churchman v. Lewis*, 34 *N. Y.*, 444.
7. An agreement which is collateral evidence, and not under seal, may be proved without producing the subscribing witness. [2 *Johns.*, 451; 21 *Vt.*, 433.] *Ct. of Appeals*, 1866, *Rundle v. Allison*, 34 *N. Y.*, 180.
8. Oral evidence admissible to establish an agreement which was never reduced to writing, and which shows the object of the execution of a document connected with the agreement. *Ct. of Appeals*, 1865, *Hutchins v. Hebbard*, 34 *N. Y.*, 24.
9. If the answer, in an action on negotiable paper, admits the receipt of a notice of protest, although too late, the statute providing that the notarial certificate is not to be received in evidence, does not apply. The statute only applies where no notice has been received at any time. *Supreme Ct.*, 1866, *Union Bank of Rochester v. Gregory*, 46 *Barb.*, 93.
10. Declarations of parties to the action, and of persons in possession of real property, in what cases admissible. *Keator v. Dimmick*, 46 *Barb.*, 158.
11. Declarations of assignors, how far admissible. *Peck v. Crouse*, 46 *Barb.*, 151.
12. The opinion of a witness is admissible upon the question of the capacity for business of the testator. [17 *N. Y.*, 340.] *Ct. of Appeals*, 1865, *Gardiner v. Gardiner*, 34 *N. Y.*, 155.
13. Opinions of witnesses,—*Held*, admissible on a question of injury to crops and probable yield. *Supreme Ct.*, 1866, *Seamans v. Smith*, 46 *Barb.*, 320.
14. In an action by commissioners of highways, to recover penalties for obstructing a highway, it is unnecessary for the plaintiffs to show that all the preliminary steps to the laying out of the road were taken. They are not bound to produce any record of the highway; but are entitled to recover, upon proof that the highway has been worked and used by the people as a public highway, and regarded as such, for fifteen years before the defendant obstructed it. [9 *Johns.*, 365.] *Supreme Ct.*, 1866, *Chapman v. Gates*, 46 *Barb.*, 313.
15. In an action for assault and battery, questions put to the physician consulted by the injured person as to the extent of the injury sustained, and the nature of that injury, are proper, although the answers depended, in part, upon the statements made by such person to the witness,—the witness not knowing or professing to know in what manner the injury happened, except by means of such statement. It is for the jury to say whether the statements be true, and if they should believe them, the testimony of the physician would be applicable. *Supreme Ct.*, 1866, *Fort v. Brown*, 46 *Barb.*, 366.

FORMER ADJUDICATION.

16. On the trial of an indictment for murder by poisoning, after proof of threats of violence by other means, the production and identification of the instrument by which the threatened injury was intended to be effected, is proper. *Ct. of Appeals*, 1866, *Le Bean v. The People*, 34 N. Y., 223.
17. On a trial for murder, there being no evidence that the deceased assaulted the prisoner, evidence of the quarrelsome character of the deceased is inadmissible. *People v. Lamb*, *Ante*, 148.
18. Where the prisoner was assaulted, it is admissible. It is fundamental to the admission of this class of testimony, that knowledge of the character of the deceased must be brought home to the knowledge of the defendant himself. *Ib.*
19. To excuse taking human life, in self-defense, the jury must be satisfied that the accused was justified, in forming the conclusion from the facts before him, that his life was in danger. *Ib.*
20. Good character of the accused is of value, not only in doubtful cases, but will of itself sometimes create a doubt, when none could exist without it, and should turn the scale in favor of the accused. *Ib.*
21. If the jury have a doubt as to what degree of guilt to convict, it is their duty to convict of the lesser degree. *Ib.*
22. The law presumes malice from the mere act of killing, where the killing is proved to have been done by the accused, and nothing further is shown. *Ib.*
23. What evidence of diligence and good faith, in performance of an agreement to keep a patented machine in operation, and pay a royalty upon its products, is sufficient to go to the jury; and of the proper rule of damages in such a case. *Newell v. Wheeler*, *Ante*, 134.
24. An objection to the reception of documentary evidence, certified by the clerk, on the ground that it is not duly certified, must state in what respect the alleged defect consists. A general objection is not sufficient to warrant the exclusion of the evidence. *Keene v. Clark*, *Ante*, 343.
25. Of the admissibility of the record of a decree as a former adjudication in a peculiar case. *Ib.*

ESTOPPEL ; WITNESS.

FEES.

COSTS ; COUNTY CLERK.

FORFEITURE.

CORPORATION, 7.

FORMER ADJUDICATION.

1. An action for a deliberate and intentional fraud practiced by a person in making a sale, may be maintained against him personally, even though he acted as the agent of another in making the sale. And it makes no

HABEAS CORPUS.

difference that the plaintiff has already sued the seller for a breach of warranty in the sale, and has been defeated in such action. If he had recovered in the first action and got his damages, he might have no further action; but where he fails by reason of having no cause of action upon the warranty, he may still have a good cause of action for the fraud, which has never been tried or determined. *Supreme Ct.*, 1866, *Gutchess v. Whiting*, 46 *Barb.*, 139.

2. In an action upon an administrator's bond, by a creditor to whom it has been assigned by the surrogate to enable him to bring such action, to recover the amount of the surrogate's decree for the payment, by the administrator, of the plaintiff's demand, if it appear that the supreme court, on an appeal from the surrogate's court, have made an order or judgment in terms reversing the decree in question, this court will not inquire whether the appeal was such as to bring the decree up for review, or whether the reversal was not inadvertent. Redress against any error in the proceedings of the supreme court in this respect, must be sought in that court. *Ruthven v. Patten*, *Ante*, 121.
3. The decision of a surrogate on a contest for appointment as administrator, determining in favor of one party as being next of kin, is not conclusive as an adjudication of the question of next of kin in a suit in equity in another court between the same parties for an accounting and distribution. *Caujolle v. Ferrie*, *Ante*, 3, *note*.
4. An order made upon petition, in a special proceeding, may be regarded as *res adjudicata*; and the petition cannot be reviewed before another judge. *Livingston's Petition*, *Ante*, 1.

GUARDIAN AD LITEM.

After an answer has been put in by a guardian *ad litem*, and judgment entered, the regularity of the service of the order for his appointment cannot be questioned. *Barnard v. Heydrick*, *Ante*, 47.

HABEAS CORPUS.

1. Under the acts of Congress of February 13, 1862, and March 3, 1865, the oath of a soldier, on enlisting, that his age is above eighteen years, makes the enlistment binding and valid, and the officers of the government and the courts have no power to discharge, in such a case, upon the ground that the soldier was under age, and had enlisted without consent of parent or guardian. *Reilly's case*, *Ante*, 336.
2. Nor does it affect the validity of the enlistment in such a case, that the recruit was, at the time, an indentured apprentice. *Ib.*
3. Upon return to a *habeas corpus*, an objection that evidence is not admissible, because the return has not been traversed, must be taken upon the hearing; and if the evidence is admitted and considered, and the decision thereon rendered, without objection, the defendant cannot raise the objection upon *certiorari*. *Supreme Ct.*, 1866, *The People v. Waldron*, 46 *Barb.*, 619.

HIGHWAYS.

1. Under the statute relating to highways (*Laws of 1847*, ch. 455),—which provides for the drawing of jurors, and that the justice shall certify their verdict,—the duties of the justice are of a ministerial character, and the verdict may be certified, in other ways than by the justice who issued the summons. The statute is to be regarded as directory in this respect. The supervisors ought to be satisfied, in case of the refusal of the justice to certify, by other competent proof of the genuineness of the verdict, and not place their refusal to audit the damages upon a matter of mere form. *Ct. of Appeals*, 1866, *The People v. Supervisors of Ulster*, 34 N. Y., 268.
2. Not every encroachment upon a highway is a nuisance; and our highway statutes give a remedy touching encroachments, much broader than the common law remedies by indictment for a nuisance. *Supreme Ct.*, 1866, *Griffith v. McCullum*, 46 *Barb.*, 561.
3. It is the duty of referees appointed by a county judge, upon an appeal from the determination of a commissioner of highways in laying out a highway, to be sworn, before proceeding to hear the appeal; and the parties have a right to presume that they have performed that duty, and cannot be charged with implied notice of their neglect. *Supreme Ct.*, 1866, *The People v. Connor*, 46 *Barb.*, 333.
4. Upon an appeal from an order of commissioners of highways, refusing to lay out a highway, the referees appointed by the county judge to hear and determine the same, must give three days' notice, in writing, to the occupant of land through which the road is contemplated, of the time and place at which they will meet, to determine the appeal. Unless such a notice is given, an order made by the referees, reversing the decision of the commissioners, will be void, and will furnish no justification for an entry upon the land, by a person claiming that the same is a public highway duly laid out by the referees. The 8th section of the act of 1847 (*Laws of 1847*, p. 584), virtually revived section 91 of the Revised Statutes (1 *Rev. Stat.*, 519), which had been repealed by chapter 180 of the Laws of 1845, and places the referees in the same position as the judges were in, under that provision. *Supreme Ct.*, 1863, *Terpening v. Smith*, 46 *Barb.*, 208.
5. Rules of the statute relative to effecting an abandonment of highways *Supreme Ct.*, 1866, *Amsbey v. Hinds*, 46 *Barb.*, 622.

HUSBAND AND WIFE.

1. Under the statutes relating to married women, the common law rule that a wife cannot take by gift from her husband is abrogated. *Rawson v. Pennsylvania R. R. Co.*, *Ante*, 220.
2. Hence a married woman may maintain an action for the loss, by the negligence of the defendants, of apparel and jewelry, which were a gift to her, whether from her husband or any other person. *Ib.*

INDICTMENT.

3. An action lies against a married woman, carrying on business in her own behalf, to recover damages for injuries sustained by the negligence of her servant. *Gillies v. Lent*, *Ante*, 455.

CAUSE OF ACTION, 10, 11; WITNESS.

IMPRISONMENT.

ARREST, 4, 5; CONTEMPT.

INDICTMENT.

1. An indictment lies against a supervisor who acts corruptly, as such, in matters tending to defraud the public, whether he is so acting within his jurisdiction or fraudulently exceeding his powers. *Supreme Ct.*, 1866, *The People v. Stocking*, 32 *How. Pr.*, 48.
2. Under the statute (3 *Rev. Stat.*, 5th ed., 963, § 11), providing that an indictment may be found against any person for the second marriage prohibited by the act, in the county in which such person shall be apprehended, and the like proceedings, &c., may be had in such county as if the offense had been committed therein,—the indictment must show that the accused was apprehended in the county where the indictment was found. This jurisdictional fact must be averred in the indictment, and cannot be properly stated in a caption to the indictment or record of conviction, for the reason that it is not a fact of which the court of sessions could take judicial notice. *Supreme Ct.*, 1866, *Houser v. The People*, 46 *Barb.*, 33.
3. Such a defect or imperfection in the indictment is not one of form, but of substance. It is a material defect, and it is not cured by statute. [3 *Rev. Stat.*, 5th ed., 1019, § 54.] *Ib.*
4. It is a rule that time and place, when and where the crime was committed, must be stated with certainty in the indictment, but it is not necessary to prove them on the trial as stated, unless they are necessary ingredients in the offense. [Arch. Cr. Pl., 40, 41.] *Supreme Ct.*, 1866, *The People v. Stocking*, 32 *How. Pr.*, 48.
5. In an indictment for obtaining money by false pretenses, it is sufficient to state, negate, and prove, one false pretense; and the materiality and influence of such pretense is a question for the jury, unless, upon the face of the indictment, the pretense appears to be clearly immaterial. *Ct. of Appeals*, 1866, *Thomas v. The People*, 34 *N. Y.*, 351.
6. Even if the objection that the indictment does not aver how the false pretense was calculated to do the mischief, were available on demurrer, or at the trial, by objection to the evidence, still the defect would be cured by verdict. It is matter of evidence, and it would be intended after verdict, that the evidence was sufficient. *Ib.*

INJUNCTION.

1. In actions to oust persons exercising the duties of public officers under a claim of right, a temporary injunction restraining them from exercising the duties of the office, pending the litigation, should not be granted. *People v. Mattier, Ante, 289.*
2. The same reasons which forbid the issuing of an injunction in such a case, apply in the case of a litigation as to officers of corporations,—such as the trustees of a State asylum. *Ib.*
3. In an action to remove the members of the board of trustees of a corporation, where the complaint does not ask for a receiver or dissolution, but contemplates the continuation of the corporation and its business under new trustees, the court will not grant an injunction pending the litigation to restrain the defendants from acting as trustees, for this would have the effect to suspend its business. *Supreme Ct., 1864, Latimer v. Eddy, 46 Barb., 61.*
4. An injunction does not lie against commissioners of pilots to restrain their removing obstructions in navigable waters. *Supreme Ct. Sp. T., 1866, Moore v. Board of Commissioners of Pilots, 32 How. Pr., 184.*
5. When it lies against a board of health. *N. Y. Common Pleas Sp. T., 1866, Cooper v. Schultz, 32 How. Pr., 107.*
6. An injunction may be issued to restrain a municipal corporation from entering into a contract which is beyond their legal powers. *Supreme Ct. Sp. T., 1866, Pullman v. Mayor, &c. of New York, Ante, 29.*
7. An injunction will not be issued to restrain a landlord from taking summary proceedings to dispossess his tenant, where the grounds on which it is sought do not raise any question which may not properly be inquired into by the magistrate before whom the proceedings are taken. *Bean v. Pettingill, Ante, 58.*
8. An action for an injunction will not lie to restrain the collection of a tax upon an illegal assessment. *The Mutual Benefit Life Insurance Co. v. The Supervisors of New York, Ante, 233.*
9. The remedy is to review and correct the assessment by *certiorari*, or to strike it from the roll by *mandamus*. *Ib.*
10. The case of *The People v. The New England Mutual Life Insurance Co.*, 26 N. Y., 303, is not an authority for sustaining such an action, for the objection was not raised in that case. *Ib.*
11. A covenant not to erect a “building” within a certain distance from a boundary line may be held, on evidence of the circumstances under which the covenant was made, to preclude the covenantor from erecting a fence, which would have the same effect in respect to shutting off light and air; and an injunction may be granted to restrain the covenantor from erecting such a fence. *Wright v. Evans, Ante, 308.*
12. A court of equity will not grant an injunction to restrain the construction of a public work, such as a railroad, made under authority of an act of the legislature, on the ground that the plaintiff will sustain indirect or con-

INSURANCE COMPANIES.

- sequential damages by the construction, where his property is not taken or appropriated. *Barnes v. South Side R. R. Co.*, *Ante*, 415.
13. Under the charter of the Hudson River Railroad Company (*Laws of 1846, 272*),—which authorizes the company to construct a road with such branches for depot and station accommodations as may be required, and by a subsequent provision declares that the road in the city of New York may be located on or westerly of Eighth avenue or Hudson street, but shall not infringe on the privileges of the Harlem Railroad by running nearer to it than the Eighth avenue and Hudson street—the company are not entitled to continue the road or run a branch from the end of Hudson street turning easterly to Broadway. *People v. Hudson River R. R. Co.*, *Ante*, 249.
14. An injunction lies to prevent such an extension of the track. *Ib.*
15. It is enough to support an injunction against several persons, that particular acts of fraud, kindred in character, are charged against them. *Mattell v. Flanagan*, *Ante*, 459.
16. While an injunction remains subsisting, it must be obeyed; and it is no answer to the charge of violating it that the injunction was, in terms, more broad than ought to have been granted,—e. g., that it restrained the defendant from disposing of any property in his possession or under his control, instead of restraining him merely from disposing of property of a judgment debtor under his possession or control. *Supreme Ct. Sp. T.*, 1867, *Peck v. Yorks*, 32 *How. Pr.*, 408.
17. But where such an injunction is modified by the court, after a technical violation, the illegal act becomes legal; upon the same principle, substantially, that an illegal act done under voidable process, is tortious when the process is set aside. [2 *Edw. Ch.*, 188; 22 *N. Y.*, 95; 11 *Wend.*, 31.] *Ib.*

ABATEMENT, 7.

INSOLVENCY.

1. It is true that "insolvency," and "inability to pay," are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency. [2 *H. J. R.*, 467.] *N. Y. Superior Ct. Sp. T.*, 1866, *Walkenshaw v. Perzel*, 32 *How. Pr.*, 233.
2. An unliquidated claim for damages arising out of a tortious act is not to be regarded as a debt within the provision of the statutes authorizing the discharge of insolvent debtors. *Zinn v. Ritterman*, *Ante*, 261

INSURANCE COMPANIES.

The relation between a mutual insurance company and its members does not permit a relaxation, between them, of the rule requiring strict performance of conditions precedent. *O'Reily v. Mutual Life Ins. Co.*, *Ante*, 167.

JUDGMENT.

INTEREST.

1. One who has received the rents and profits of land, not being entitled to them, as against a judgment creditor having an equitable right to the property, for the satisfaction of his debt, and to the rents and profits that they may be so applied, is chargeable with interest, on accounting for the rents and profits. *Supreme Ct.*, 1866, *Cowing v. Howard*, 46 *Barb.*, 579.
2. Where one claiming to own property under a title which had been adjudged void as to the plaintiff, had kept the latter out of possession of his rights for many years, he, in the mean time, enjoying the property, receiving a large amount of rents and profits, and using them in his business, — *Held*, that he should pay interest. *Ib.*

JUDGMENT.

1. The omission to give notice of an adjustment of costs, before entering judgment on default, does not affect the regularity of the judgment. At most it is only ground for striking the costs from the judgment. *Petrie v. Fitzgerald*, *Ante*, 354.
2. The finding of the judge, in a judgment entered upon the report of a referee, to whom it has been referred to take an account, and adopted as the basis of the judgment, may be construed by the language of the report. *Mason v. Ring*, *Ante*, 324.
3. Section 282 of the Code of Procedure,—which hitherto provided that a judgment for the payment of money might be docketed with the clerk of the county *where it was rendered*, and should be a lien for ten years from the time of docketing the same, in the county *where it was rendered*, amended* so as to read as follows: "Upon filing a judgment-roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the county *where the judgment-roll was filed*, and in any other county upon the filing with the clerk thereof a transcript of the original 'docket,' and shall be a lien on the real property in the county where the same is docketed of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county *where the judgment-roll was filed*. [But the time during which the party recovering or owning such judgment shall be or shall have been restrained from proceeding thereon by any order of injunction, or other order, or by the operation of any appeal, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor, or mortgagee in good faith.] But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an

* The amendment consists in the words inserted in italics, and in the insertion of the clause indicated by brackets.

JUSTICES' COURTS.

- entry to be made by the clerk on the docket of such judgment, that the same is 'secured on appeal,' and thereupon it shall cease during the pendency of said appeal to be a lien on the real property of the judgment debtor, as against purchasers and mortgagees in good faith." *Laws of 1867*, ch. 781, § 10.
4. After the lien of a judgment has been suspended by an order vacating the judgment, when such order ceases to have any validity by being vacated, the lien is revived, as though it had never been suspended; and where no new rights have been acquired by the other judgment creditors, by proceedings under their several judgments, all parties are restored to their original rights. *Ct. of Appeals*, 1866, *King v. Harris*, 34 N. Y., 330.
 5. It would be otherwise of *bona fide* purchasers who, in the mean time had intervened; and as to them the vacatur of the judgment would be held operative and binding as against transactions entered into, while the judgment appeared from the docket to be vacated, and they were without notice of the order of reversal. *Ib.*

ASSIGNMENT, 2; COMPROMISE.

JURISDICTION.

1. An action will not lie in the courts of this State to set aside a fraudulent conveyance of land in another State. *N. Y. Superior Ct. Sp. T.*, 1865, *Bennett v. Erving*, 32 *How. Pr.*, 384.
2. A State court has not power, upon a *habeas corpus*, to inquire into the validity of an enlistment in the army of the United States. Since the validity of the enlistment depends upon the construction of the acts of Congress, the application should be to the judicial tribunals of the United States. *Reilly's case*, *Ante*, 336.
3. The case of *Ableman v. Booth*, 21 *How. (U. S.)*, 506, explained and followed. *Ib.*

INDICTMENT, 2.

JURY.

HIGHWAYS; TRIAL.

JUSTICES' COURTS.

1. The police justice of the city of Rochester, under the 65th section of the city charter,—which makes it his duty to attend to 'all complaints of a criminal nature which may come before him,—has jurisdiction to hold cognizance of a complaint for a violation of an ordinance, regulating the keeping of lumber in the Erie Canal feeder, or basins adjoining the same. *Supreme Ct.*, 1866, *The People v. Bryan*, 46 *Barb.*, 355.
2. Answer may contain notice of facts constituting counter-claim as well as of defense. *Code of Pro.*, § 64, subd. 4, as amended by *Laws of 1867*, ch. 781.
3. In an action against a person for obstructing a highway, brought by the commissioner of highways, under the statute, it is competent for the defen-

LIMITATIONS.

dant to allege that he owned the fee, deny the existence of the alleged highway, and such a plea will oust the jurisdiction of a justice, because it puts in question the title to land. *Ct. of Appeals*, 1866, *Little v. Denn*, 34 N. Y., 452.

4. In such case the defendant must, if he would have the benefit of his possession as owner of the soil, give the requisite bond or undertaking on interposing such an answer. *Ib.*
5. The time to serve notice of appeal from a justice's judgment is to be computed by excluding the day on which the justice's judgment was entered, and including the last day on which the notice may be served. [11 How., 193; distinguishing 24 How., 195.] *Supreme Ct.*, 1866, *Young v. Whitcomb*, 46 *Barb.*, 615.
6. In determining which party to an action, brought by appeal from a justice's court to a county court, should recover costs of the appeal, the county court can only compare the judgment of the justice, as it was rendered, with the recovery in the county court. The statute does not authorize the county court to cast interest on the judgment of the justice, and add it to such judgment, to make the amount to be compared with the verdict in the county court. *Smith v. May*, *Ante*, 227.

LIMITATIONS.

1. Of the policy of the statute, and its application as against a claim of set-off. *Supreme Ct.*, 1866, *Thompson v. Sickles*, 46 *Barb.*, 49.
2. Where there is a legal and equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar with the former. [7 Johns. Ch., 90; 7 Paige, 195; S. C., affirmed, 24 Wend., 587; 15 N. Y., 505.] But where the remedy is not at law, but in equity, the legal limitation does not apply. Thus, in an action by the beneficiaries under a will, to compel payment of the trust fund by the trustees or executors, the limitation of ten years, not that of six years, applies. *Ct. of Appeals*, 1866, *Rundle v. Allison*, 34 N. Y., 180.
3. In an action against a sheriff for omitting to return an execution, the statute of limitations is to be regarded as commencing to run at the time of the expiration of the sixty days, within which the law requires a sheriff to return an execution. No attachment or notice to the sheriff is necessary to make the cause of action accrue, nor is the case altered by evidence that subsequent to that time the sheriff suppressed the execution, and suffered property which he had levied upon to go to waste. The action must be brought within three years of the time the execution was returnable, without reference to such subsequent acts of the sheriff. *Supreme Ct.*, 1866, *Peck v. Hurlburt*, 46 *Barb.*, 539.
4. If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or

MANDAMUS.

taken as any part of the time limited for the commencement of such action.* *Code of Pro.*, § 100, as amended by *Laws of 1867*, ch. 781, § 6.

5. A partial payment of a debt, made by assignees under a general assignment for the benefit of creditors, in pursuance of the authority to pay debts, conferred upon them by the assignment, is not evidence from which the law will imply a new promise by the assignors to pay the remainder of the note, sufficient to take it out of the statute of limitations. It would be unreasonable to construe payments by those who are not parties to the contract, nor under any personal obligation in respect to them, but are appointed to execute specific duties, as evidence of a willingness and intention by the original debtor, to pay the entire debt; it would be a perversion of the intention of the parties, to make the simple execution of the trust by the assignees, the ground of a new assumption of the debt by the debtor. *Ct. of Appeals*, 1866, *Picket v. Leonard*, 34 N. Y., 175.

MANDAMUS.

1. Mandamus is not the proper remedy to test a claim to the office of president of a board of public officers: the claim of the possession of the books and papers should be tried by the proceedings provided for that purpose, by statute; and the title to office should be tried by an action of *quo warranto*. *People ex rel. Bradley v. Stephens*, *Ante*, 350.
2. A mandamus should not be issued, as a general rule, in cases where the right of the relator depends upon holding an act of the legislature unconstitutional. *Ib.*
3. *It seems*, that a mandamus may be granted to compel the clerk of a municipal corporation to execute a contract under the seal of the corporation. *People ex rel. Wood v. Connolly*, *Ante*, 315.
4. A mandamus is not to be granted against the city of New York to compel the payment of a claim, unless it clearly appears that there is money in the treasury appropriated to the purpose. Otherwise the remedy must be by action. *Ib.*
5. A mandamus lies to compel public officers, who have advertised for proposals for a contract, to award the contract to one who is the lowest bidder, and has clearly conformed, in substance, to the requirements of the case. In such case there is no discretion left to the defendants, but the bidder is entitled to the contract as a matter of law. *Supreme Ct.*, 1865, *The People, ex rel. Vickerman v. Contracting Board*, 46 *Barb.*, 254.
6. This remedy is not defeated upon the theory that the State is the defendant, and that a party can not sue the State. For this purpose, the State is not the defendant, but certain ministerial officers, who are bound to perform their duties. *Ib.*
7. When issued to correct an assessment by the assessors of taxes. *The People v. Board of Education of Lockport*, 46 *Barb.*, 588.

* The amendment consists in the insertion of the words in *Italics*.

MECHANICS' LIEN.

8. An application to the court for a writ of mandamus against public officers must be made within the judicial district in which the action resulting from the issue of such a writ would be triable, or in a county adjoining that in which the action would be triable. *People ex rel. Cagger v. Supervisors of Schuyler, Ante, 78.*
9. Such an application is not, in itself, a suit or action, within the meaning of 2 *Rev. Stat.*, 353, § 14,—which provides that every action against a public officer, for or concerning any act done by virtue of his office, shall be laid in the county where the fact complained of happened;—but it is to be regarded as a motion, within the spirit of section 401 of the *Code of Procedure. Ib.*
10. An affidavit stating that the services claimed for were performed (but not stating that they were rendered for the county), and that no part of the claim had been paid by the board or any one *on their behalf*, is not a sufficient verification, to make it the duty of the board of supervisors to act upon the claim. *Ib.*
11. When an application for a writ of mandamus, made upon affidavit and on notice, is met by counter affidavits showing that material questions of fact are in dispute, such questions must be determined before the court can decide the questions of law and grant a peremptory writ. *Ib.*
12. Of irrelevant pleading and immaterial issues. *Ct. of Appeals, 1866, The People v. Supervisors of Ulster, 34 N. Y., 268.*
13. When a mandamus has been issued requiring public officers to award a contract to the relator, the court will not, upon appeal, reverse the order, on the objection that the defendants no longer have it in their power to perform the duty required of them. That question would properly be presented to the consideration of the court upon awarding the writ; and the cases which sustain this doctrine were cases where the question arose upon the original application for the writ, or on the trial. [12 *Barb.*, 217; 15 *Id.*, 607; 27 *Id.*, 96; 27 *N. Y.*, 318.] *Supreme Ct., 1865, The People ex rel. Vickerman v. Contracting Board, 46 Barb., 254.*

MANUFACTURING COMPANIES.

Section 24 of the general law authorizing the formation of manufacturing, &c., corporations,—which requires suit to be brought against the company before an action to enforce the personal liability of stockholders can be maintained,—is to be construed as requiring the recovery of judgment, and the return of execution unsatisfied, in such suit. *Lindsley v. Simonds, Ante, 69.*

MECHANICS' LIEN.

1. A mechanic's lien, filed under the statute, can only be discharged in one of the modes prescribed by the statute. *Fettrich v. Totten, Ante, 264.*
N. S.—VOL. II.—34.

MOTIONS AND ORDERS.

2. The court has not the power to discharge the lien before the lapse of a year, and without proceedings taken under the statute. *Ib.*
3. Proceedings in mechanics' lien cases in the city of Albany, regulated. *Laws of 1867*, ch. 129, amending *Laws of 1842*, ch. 275, § 73.

MINISTERIAL ACTS.

HIGHWAYS, 1.

MISTAKE.

1. A court of equity will not reform a written contract on parol evidence that it does not express the intent of the parties, unless the mistake is clearly made out, by proofs entirely satisfactory. *Pennell v. Wilson*, *Ante*, 466.
2. A mutual mistake must be shown. A mistake on one side, in the absence of any fraud on the other, does not authorize the interference of the court. *Ib.*
3. These rules applied to the case of a stipulation between vendor and purchaser, apportioning the taxes of the year. *Ib.*

MOTIONS AND ORDERS.

1. An order made by the court must be entered accordingly, and it is irregular to disregard it because erroneous, and to enter a different order. *Williams v. Murray*, *Ante*, 292.
2. Whenever a motion shall be made in any cause or proceeding in any of the courts of this State, to obtain an injunction order, order of arrest, or warrant of attachment, or to vacate, modify, or set aside any injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion, within twenty days after the day upon which such motion shall or may be submitted to him for his decision. *Code of Pro.*, § 401, subd., 8. Added by *Laws of 1867*, ch. 781, § 15.
3. The court have power to revoke or vacate an order directing the prosecution of the bond given by the party upon his arrest for contempt, where the prosecuting party has enforced satisfaction by the actual imprisonment of the party proceeded against. An order to prosecute the bond does not give a vested right to recover and collect the damages, which the court cannot impair. *Supreme Ct.*, 1867, *Barton v. Butts*, 32 *How. Pr.*, 456.
4. An order, made upon motion in a special proceeding, is not a proper subject for a re-hearing. *Livingston's Petition*, *Ante*, 1.
5. The practice of amending and ante-dating orders, in a peculiar case, discussed and condemned. *Ib.*
6. Where it was evident that an order removing a trustee was not promul-

NEW TRIAL.

- gated until a certain date,—*Held*, that such order could not take effect prior to that time, by force of *another order*, made afterwards. *Ib.*
7. After a motion has been denied, upon the ground that material facts, stated in the moving papers, ought to have been substantiated by the oath of the witnesses, instead of merely by that of the attorney or party, it is proper to grant an application for leave to renew the motion, especially where the objection was not interposed by counsel, but was raised by the court, of its own motion. *Adams v. Bush* [No. 2], *Ante*, 112.
 8. The court will not refuse leave to renew a motion merely because the costs of a former application remain unpaid, unless it appears that the party seeks to avoid payment, or is insolvent, or has no property within the jurisdiction of the court, from which payment may be obtained by the usual process. *Ib.*
 9. A decision of the supreme court of the general term should not be reconsidered by a single judge sitting at a special term, though on an intermediate appeal to the court of appeals a member of that court may have expressed an adverse opinion to that of the supreme court. *Ib.*
 10. An order for publication of summons is not avoided by the fact that an affidavit relied on as showing a material fact on which the order was granted, was made and entitled in another action. It is allowable on such applications to read affidavits that have been used in a different suit. *Barnard v. Heydrick*, *Ante*, 47.

AMENDMENT, 4; APPEAL; ARREST, 4, 5; CASE; COSTS, 10; COURT OF APPEALS; MANDAMUS; NEW TRIAL; REFERENCE; SERVICE (and Proof of); SUPPLEMENTARY PROCEEDINGS.

MUNICIPAL CORPORATIONS.

1. A corporator of a municipal corporation has a right to have a general inspection, and take copies of the public documents and records of the corporation of which he is a member, under such rules and restrictions as will preserve the safety of the records, and prevent any serious interruption of the duties of the *custos*. [Reviewing many authorities.] *Supreme Ct., Sp. T.*, 1866, *The People v. Cornell*, 32 *How. Pr.*, 149.
2. Municipal corporations not liable for obstructions of the street caused by private individuals, in the absence of notice or presumption of notice thereof. *Supreme Ct.*, 1866, *Darlon v. City of Brooklyn*, 46 *Barb.*, 604.

NEW TRIAL.

1. In the New York superior court, a motion for a new trial cannot be made *after judgment*, except upon special cause shown. *Magnus v. Trischet*, *Ante*, 175.
2. To support a motion for a new trial upon the ground of newly discovered evidence, the moving papers should contain an affidavit of the witnesses who, it is claimed, will give the additional evidence relied on, stating that

NEW YORK (CITY OF).

- they are ready to swear to the facts claimed to be newly discovered. *Adams v. Bush* [No. 1], *Ante*, 104.
3. The rules applicable to the question of what newly discovered evidence is ground for granting a new trial, stated and applied, *Per DENIO*, Ch. J. *Ib.*
 4. Although in actions at law a motion for a new trial is frequently determined upon strict rules, yet in a court of equity, where a trial by jury has been directed to ascertain facts for the information of the court, a new trial will not be ordered, whether the error complained of was the admission of improper testimony, or the rejection of that which was proper, or a misdirection on the part of the judge, unless the court, taking the whole of the evidence together, and connecting it with the judge's charge, think that injustice has been done by the error committed, and are dissatisfied with the verdict. *Clark v. Brooks*, *Ante*, 385.
 5. *It seems*, that in a case of an equitable nature, an application for a new trial is in the discretion of the court, and the existence of irregularities or errors upon the trial, do not, as a matter of strict right, entitle the unsuccessful party to an order for a new trial. *Ib.*
 6. An objection to a recovery may be a sufficient ground for granting a new trial, although not taken at the trial below, if the point is good in law, and could not have been obviated by proof. *Kowing n. Manly*, *Ante*, 377.
 7. Immaterial evidence which did not prejudice the unsuccessful party is not ground of reversing a judgment. *Ct. of Appeals*, 1866, *Rundle v. Allison*, 34 N. Y., 180.
 8. Where a remark of a judge, in refusing to charge as requested, though erroneous, does no harm, because it was a mere abstraction, having nothing to do with the matter in hand, it will afford no ground for reversing the judgment, or granting a new trial. The rule on this subject is the same in criminal as in civil cases. *Supreme Ct.*, 1866, *Patterson v. The People*, 46 *Barb.*, 625.
 9. In an action of an equitable nature,—*e. g.*, to reform a contract on the ground of mistake, and for judgment upon it,—the common law rule that on reversing judgment and ordering new trial for insufficiency of evidence, the appellant is chargeable with costs, does not apply. *Pennell v. Wilson*, *Ante*, 466.
 10. In such actions the question of costs is in the discretion of the court, and may be adjudicated on the final hearing. *Ib.*
 11. The order for a new trial should not contain any direction respecting costs. *Ib.*

NEW YORK (CITY OF).

1. Under the provision of the act of 1866 (Laws of 1866, 2056),—relating to the Croton aqueduct department in the city of New York, and providing that any vacancy in their number shall be filled by the members of the board remaining in office,—the vacancies referred to are those in the board, and not in the offices of the previously named engineer and assistant commissioner. *People ex rel. Bradley v. Stephens*, *Ante*, 350.

NUISANCES.

2. Under the provisions of the act of 1866, the corporation of the city of New York are not authorized to make a contract for lighting the city with gas, for a period beyond one year, or an amount larger than the sum appropriated by the act. *Supreme Ct. Sp. T.*, 1866, *Pullman v. Mayor, &c. of New York, Ante*, 29.
3. Powers of the board of education, and of the local school officers, in the appointment and removal of teachers. *People ex rel. Banks v. Board of Education, Ante*, 177.
4. Proceedings given for collection of personal taxes. *Laws of 1867*, ch. 334.
5. Proceedings in cases of unsafe buildings, &c. under the fire laws, regulated. *Laws of 1867*, ch. 939, amending act of 1866.

MANDAMUS.

NONSUIT.

Of the rules regulating the liability of common carriers for personal injuries, and the cases in which the plaintiff in such an action should be nonsuited upon the evidence. *Ct. of Appeals*, 1866, *Brown v. New York Central R. R. Co.*, 34 N. Y., 404; *Beisiegel v. New York Central R. R. Co., Id.*, 622; 1865, *Deyo v. New York Central R. R. Co., Id.*, 9; *N. Y. Superior Ct.*, 1867, *Mettlestadt v. Ninth Avenue R. R. Co.*, 32 *How. Pr.*, 428.

NOTARY

A certificate of protest need not state the due and customary presentment made, to have been personally made by the notary, if it states the demand of acceptance to have been personally made, and the protest to be his personal act. *Ct. of Appeals*, 1866, *McAndrew v. Radway*, 34 N. Y., 511.

NOTICE.

ATTACHMENT, 2, 3; CARRIER; PARTNERSHIP, 2; WAIVER, 1.

NUISANCES.

1. That which is exclusively a common or public nuisance, cannot lawfully be abated by the private act of individuals. The remedy is an indictment—a criminal prosecution; unless some other remedy has been provided by statute, as in the case in some of our city and village acts of incorporation. *Supreme Ct.*, 1866, *Griffith v. McCullam*, 46 *Barb.*, 561.
2. A private nuisance may be abated by the party aggrieved. *Ib.*

ABATEMENT; HIGHWAYS, 2.

OFFER TO ALLOW JUDGMENT.

1. In an action for foreclosure of a mortgage on which a part is not yet due, an offer to allow judgment is not sufficient if it only specifies the amount already due for which judgment may be entered, without providing for a judgment fixing the amount to become due, although the complaint contains an allegation of such amount, and it is not denied by the answer. *Supreme Ct.*, 1866, *Betts v. Goodwill*, 32 *How. Pr.*, 137.
2. To promote the object designed to be accomplished by the offer, it should be required to be couched in clear and explicit language, leaving no reasonable grounds for controversy or misunderstanding respecting the relief proposed by it, or the judgment the party would be entitled to enter upon the acceptance of it. *Ib.*
3. These offers should be construed most strongly against the party making them, for they are always made in language of his own selection. But when so construed, if the offer still proves to be so ambiguous, uncertain, or indefinite, as to leave it doubtful whether it includes an offer of all the relief the party receiving it is justly entitled to recover; the party serving it has no good ground of complaint, if he is charged with costs, since he had it in his own power to avoid this, by merely using language so plain as clearly to comprehend all that the other party was entitled to demand. *Ib.*

OFFICERS

1. Although the rule is that no civil action can be maintained against the judges of the superior courts of general jurisdiction, for any act done by them in a judicial capacity [5 *J. R.*, 282], yet if a supervisor, acting as a member of the board of supervisors, knowingly, corruptly, unlawfully and partially, votes that an account presented against the county as a county charge, be allowed and made a charge against the county, he is guilty of a misdemeanor, and may and should be indicted, tried, convicted and punished. *Supreme Ct.*, 1866, *The People v. Stocking*, 32 *How. Pr.*, 48.
2. Liability of officer for directing a wrongful arrest. *Supreme Ct.*, 1866, *Green v. Kennedy*, 46 *Barb.*, 16.

ABATEMENT, 1; CAUSE OF ACTION, 9; INDICTMENT, 1; MANDAMUS;
NEW YORK; SHERIFFS.

PARTIES.

1. A town may sue and be sued in all controversies between it and others [18 *N. Y.*, 155, 157; 1 *Rev. Stat.*, 5th ed., 813, 836]; and in all litigation must sue and be sued by its name, except where officers are specially authorized by law to sue in their name of office, for its benefit. [1 *Rev. Stat.*,

- 5th ed., 836.] *Supreme Ct.*, 1866, *Town of Duaneburgh v. Jenkins*, 46 *Barb.*, 294.
2. Action upon a subscription paper payable to trustees for the contribution of a fund to enable them to accept an act of incorporation,—*Held*, properly brought in the name of the trustees. *Supreme Ct.*, 1865, *Hutchins v. Smith*, 46 *Barb.*, 235.
 3. In an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such action. *Laws of 1867*, ch. 781, § 7, amending *Code of Pro.*, § 118, by adding this provision.
 4. The penalty given by the act of May 2, 1864, “to protect butter and cheese manufactories” (*Laws of 1864*, ch. 518),—which is, by the terms of the statute, “to be sued for in any court of competent jurisdiction, for the benefit of the person or persons, &c., upon whom such fraud shall be committed,”—may be sued for and recovered by the persons for whose benefit the suit is prosecuted, *i. e.*, the real parties in interest who are injured by the fraud. *Supreme Ct.*, 1866, *Thompson v. Howe*, 46 *Barb.*, 287.
 5. Under the act of 1849, ch. 258, as extended by the act of 1851, ch. 455, the right to sue in the name of the president or treasurer of an association is extended to other companies and associations than such as are organized in pursuance of the statute. Such an action may be brought by the treasurer of any company or association composed of not less than seven persons, jointly interested in property or its proceeds,—*e. g.*, the persons interested in a cheese factory, and as such entitled to recover a penalty, under the statute, from a person bringing diluted milk. *Supreme Ct.*, 1867, *Bridebecker v. Hoard*, 32 *How. Pr.*, 289.
 6. Such action, made under the act of 1865, ch. 361, giving a right to recover such penalty, be maintained by the treasurer of the association on its behalf against one of the members of the association. The statute is intended to include all cases of bringing diluted milk, whether the act complained of was done by a corporator or was not, or by a third person. *Ib.*
 7. An action to remove individuals, trustees of a corporation, from their office, is properly brought in the name of one of the trustees. *Supreme Ct.*, 1864, *Latimer v. Eddy*, 46 *Barb.*, 61.
 8. Residuary legatees entitled to sue for insurance. *Supreme Ct.*, 1866, *Colburn v. Lansing*, 46 *Barb.*, 37.
 9. An administrator appointed to administer upon the assets left unadministered on the death of the executor of a testator, may maintain an action against an executor of such former executor to recover the assets; and such action is properly brought against the executor of the executor, in the representative capacity. *Walton v. Walton*, *Ante*, 428.
 10. Under the married women’s acts, authorizing a wife to carry on business, with all the incidents and rights of property, the husband is not liable either on her contracts or for her negligence; but actions of such causes are to be brought against her, and the judgments enforced against her separate estate. *Gillies v. Lent*, *Ante*, 455.

PARTNERSHIP.

11. In an action to enjoin the violation of a trademark, persons who are not the publishers or makers of the infringing article, and who are engaged as the vendors thereof, may be joined as defendants with the former. The acts of both parties are to be regarded as kindred, and both wrong-doers may be joined in one action. *Matsell v. Flanagan, Ante, 459.*
12. In an action by creditors to settle the affairs of a limited partnership formed under the statute, it is essential before taking away the control of the assets of the limited partnership from the members of the firm on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control, are before the court as parties. *N. Y. Superior Ct. Sp. T., 1866, Walkenshaw v. Perzel, 32 How. Pr., 253.*
13. Where a limited partner makes a loan to the firm, and dies, it is for the executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent to continue the partnership, or urge their claim for money lent. The provision of the Revised Statutes as to suing the general partners, or their being sued alone (1 Rev. Stat., 766, § 14), does not apply to such an action. The words of the statute are "in relation to the business of the partnership," and refer merely to claims by or against them as a partnership. Such executors, therefore, ought to be made parties to the action, and as they may represent conflicting interests of the testator as to carrying on the partnership business, or destroying it, and enforcing the claim of their testator for advances, they should most properly be defendants. *Ib.*
14. Where in an action against several defendants, some are not served and do not appear, as to others the complaint is dismissed, and final judgment is given against others, none of whom appeal, and the only remaining defendant appeals from the judgment against him, he alone is to be thereafter considered as the defendant in the action. *Ct. of Appeals, 1864, Babcock v. Utter, 32 How. Pr., 439.*

ABATEMENT, 1-3; AMENDMENT, 3; CAUSE OF ACTION, 10-14;
REFERENCE, 7.

PARTNERSHIP.

- 1 A partnership for no definite period is dissolvable by either party by mere notice; and such notice may be implied. *Pine v. Ormsbee, Ante, 375.*
2. If, after the dissolution of the partnership, either party continues the use of the partnership property, he may be required to account for such use, although it was only a partnership in proceeds, and not in the stock. *Ib.*
3. Of the requisite provisions of the interlocutory judgment for an accounting in such case. *Ib.*
4. Rules applicable to loans by the special partner to the limited partnership of which he is a member, and to administering the assets of such partnerships. *N. Y. Supreme Ct. Sp. T., 1866, Walkenshaw v. Perzel, 32 How. Pr., 233.*

PENALTIES.

PARTIES, 4-6.

PLEADING.

1. In an action brought by an assignee of a demand, an answer interposing, as a set-off, a claim subsisting in favor of the defendant against the assignor, is not to be regarded as setting up a counter-claim; and the plaintiff need not put in a reply of the statute of limitations, in order to avail himself of such statute against the claim so set up. *Supreme Ct.*, 1866, *Thompson v. Sickles*, 46 *Barb.*, 49.
2. In an action of ejectment under the general issue, the question at issue is, not whether the ancestor once had title and the right of possession, but whether the plaintiffs, at the commencement of the action, had such title and right. Under the general issue, or a general denial of all the allegations of the complaint, the defendant may controvert, by evidence, any and every fact which the plaintiff is bound to establish to make out his cause of action. [16 *Barb.*, 633.] He can not, under such an answer, prove a discharge of a cause of action once existing in the plaintiff against him, because that is an affirmative defense, or new matter which must be pleaded. But he may show that the plaintiff never had any such cause of action against him as is alleged in the complaint. *Supreme Ct.*, 1866, *Raynor v. Timerson*, 46 *Barb.*, 518.
3. In the case of a commissioner suing the owner of the land for obstructing a public highway, it is the undoubted right of the defendant to question the legal existence of the highway. Such a right, however, cannot be asserted by him in any case in a justice's court. When called upon to plead, if he only intends to deny the fact that he placed the obstruction in the road, he may rely upon a general denial of the complaint. If he wishes to justify upon the ground that he had the right to put the fence across it, as owner of the land, he must allege that he is such owner; and this is sufficient to raise a question of title in a justice's court, for such an answer can mean nothing unless the defendant intends to question the public right of way over his land. *Ct. of Appeals*, 1866, *Little v. Denn*, 34 *N. Y.*, 452.
4. When the cause is removed into the supreme court upon a plea of title, the plaintiff, being a commissioner of highways, may, in the first instance, prove a highway *de facto*, by the same degree of evidence that would be admissible in a justice's court for that purpose; and when he further proves that the defendant obstructed such highway, he may rest, and claim a verdict. The defendant, however, may, under his plea of title, give in evidence his title deeds, or show himself in possession of the adjacent land, and then rest his case. The *onus probandi* is then thrown upon the plaintiff to prove that the alleged highway has been duly laid out by the commissioner, or that it is a highway by dedication or twenty

PRINCIPAL AND SURETY.

years' use. But in a justice's court, the defendant could not be permitted to show that he was ever the owner of the fee, not having the actual possession of the *locus in quo*. *Ib.*

5. In such an action a general plea of title, after expressly negating the right of highway, may be regarded as sufficient, under the liberal rule of § 25 of the Code. *Ib.*
6. What amounts to an allegation in pleading, of impossibility, to excuse non-payment. *O'Reily v. Mutual Life Ins. Co.*, *Ante*, 167.
7. The complaint may be attacked on demurrer to answer. *Pardo v. Osgood*, *Ante*, 365.
8. It is not the duty of a court to resort to an inference on an argument as to the meaning of a bad pleading, in order to sustain it on demurrer. Parties are required to make clear and distinct statements in their pleadings. Every intendment, on a demurrer, is against the pleader. Courts are not to labor to make a better statement for a pleader, on a technical issue of this kind, than he has made for himself. *Ct. of Appeals*, 1866, *The People v. Supervisors of Ulster*, 34 N. Y., 268.

ACTION, 7, 8; ANSWER; COMPLAINT; INDICTMENT; MANDAMUS.

POLICE.

1. The majority of the board of excise in the metropolitan police district, excepting Westchester county, declared to be a quorum; but a majority of the board must concur in any act. *Laws of 1867*, ch. 77.
2. Act in relation to the Niagara frontier police district. *Laws of 1867*, ch. 232.

POOR.

1. A police justice of the city of New York has the power to issue a warrant in that city, to the commissioners of public charities and corrections, against the estate of an absconded husband and father, as two justices of the peace have in other counties, to issue such a warrant to the overseers of the poor. *The Commissioners' Attachment*, *Ante*, 83.
2. Although a warrant may be issued, in such a case, against real property as well as personal property, it cannot be sustained where the only interest of the absentee is a remainder dependent upon an outstanding life estate, and there are no rents or profits accruing to him meanwhile. *Ib.*

PRINCIPAL AND SURETY.

1. Although a surety or guarantor, who agrees to become bound for a certain sum to be loaned in cash to his principal for particular purposes, is relieved from liability if the lender, knowing of such agreement, advances the amount merely by transferring securities for a part, and adjusting the residue by discharging an old debt; yet, where the agreement of the lender to make such an advance upon the guaranty is first made, and the guar-

RECORDS.

anty having been afterward obtained the lender faithfully performs his agreement, the surety or guarantor is not absolved from liability because the principal debtor induced him to become bound by a concealment or misrepresentation as to the nature of the agreement, unknown to the lender. *McWilliams v. Mason, Ante, 211.*

2. The previous decision in this case, in 6 *Duer*, 276, distinguished and approved. *Ib.*

ATTACHMENT, 6; BAIL; UNDERTAKING.

PROPOSALS.

A certificate of deposit accompanying proposals for a public contract, which is in terms payable to the depositor, and is by him indorsed to the proper public officer, is equivalent to a certificate payable in terms to such officer, within the requirements of the advertisement for proposals. *Supreme Ct., 1865, The People ex rel. Vickerman v. Contracting Board, 46 Barb., 254.*

PROTEST.

NOTARY.

QUESTIONS OF LAW AND FACT.

The question what articles in a passenger's trunk were necessary for the journey, is a question of fact, to be determined by the jury. *Rawson v. Pennsylvania R. R. Co., Ante, 220.*

RECEIVERS.

Receivers of the property within this State of foreign and other corporations shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent. on the amount received and disbursed by them.* *Code of Pro., § 244, subd. 4, last clause, as amended by Laws of 1867, ch. 781, § 8.*

RECORDS.

The statute requiring all assignments of real estate to be recorded (1 *Rev. Stat.*, 756, §§ 1, 38), applies to assignments of mortgages. [3 *Rev. Stat.*, 2d ed., p. 607; 11 *Paige*, 28; 5 *Denio*, 187.] To give the registry act, so far as relates to the assignment of mortgages, any effect, it must be held that subsequent grantees or mortgagees of the land for a valuable consideration, without any actual notice of the unrecorded assignment, are to be

* The amendment consists in substituting a commission, not exceeding five per cent, instead of the rate allowed by law to trustees of estates of absconding debtors, and in extending this provision to the case of domestic corporations.

RE-HEARING.

regarded as purchasers in good faith, under the act. *Supreme Ct.*, 1866, *Pardy v. Huntington*, 46 *Barb.*, 389.

EVIDENCE; FORMER ADJUDICATION; MUNICIPAL CORPORATION.

REFERENCE.

1. An action to set aside a fraudulent conveyance, on the ground that it was made when the defendant was insolvent, is not to be referred, as involving the examination of a long account. *Bushnell v. Eastman*, *Ante*, 412.
2. An action on the statute to recover from a city or county the damages incurred by the plaintiff from a mob or riot, though involving a large number of items of damage, is not an action involving the examination of a long account, and, therefore, cannot be ordered to a reference without consent of parties. *Ross v. The Mayor, &c. of New York*, *Ante*, 263.
3. The power conferred by the statute (*Code*, § 271), to refer actions involving the examination of a long account, is intended more for the convenience of the court, than as conferring a right on the parties. *Goodyear v. Brooks*, *Ante*, 296.
4. The difficult questions of law, intended by the statute, are not merely those arising out of the facts presented by the issues in the case, but include questions growing out of the very character of the issues, such as questions of evidence on an issue of fraud. *Ib.*
5. In the case of an action to foreclose chattel mortgages, where the defense was that the mortgages were fraudulent,—*Held*, that the necessity of proving good faith and honest intent, would probably raise difficult questions of law, and, therefore, the case was not one which should be referred. *Ib.*
6. *It seems*, that proof of an intention on the part of the defendants to apply for a trial of the issues by a jury, is not, of itself, an objection to granting the plaintiff's motion for an order referring the cause to a referee. *Ib.*
7. An action for the foreclosure of the mortgage is not in a condition to have all the issues therein referred, while any defendants, against whom the plaintiff seeks a judgment over for a deficiency, have not been served with summons, or have been served with a notice that no personal claim is made against them, and have not appeared. *Ib.*

ALIMONY.

RE-HEARING.

1. In courts other than those of last resort, a re-argument of a cause, decided at one general term, should not be ordered by the judges holding another general term, upon allegations of a misunderstanding of the facts, or of an error in reversing a judgment which might have been allowed to stand by reducing its amount. *Newell v. Wheeler*, *Ante*, 134.
2. A new trial, or an appeal, is the proper remedy in such a case. *Ib.*
3. The practice of one judge re-hearing a matter decided by another judge, condemned. *Livingston's Petition*, *Ante*, 1.

RELIGIOUS CORPORATIONS.

1. In a proceeding for a sale of the property of a religious corporation, allegations that the income of the society was not sufficient to pay their liabilities or meet current expenses, are sustained by proof that the current expenses, including interest due by the terms of bonds issued by the society, though not called for by the bondholders, are in excess of receipts. *The Madison Avenue Baptist Church v. The Baptist Church in Oliver Street, Ante*, 254.
2. The jurisdiction of the court does not depend on the question whether the committee were appointed by the corporators, if it be shown that the corporators, at a corporate meeting, ratified the action of such committee. *Ib.*
3. To constitute a corporate meeting of a religious society it is not necessary that a majority be present. If the meeting is regularly held, those present constitute a quorum, and a majority of them can pass a resolution. *Ib.*
4. The presence of strangers will not vitiate the proceedings, unless they voted, and their votes were necessary to carry the resolution. *Ib.*
5. What is sufficient evidence of the number of corporators. *Ib.*
6. A mistaken statement in a petition,—*Held*, not ground for avoiding the order made thereon. *Ib.*

REMOVAL OF CAUSES.

1. An action brought by an assignee of a claim for damage, for the breach of a contract of a common carrier to carry goods, is an action by an assignee of a promissory note or chose in action, within the meaning of the judiciary act, and cannot be removed into the circuit court of the United States. A chose in action or a thing in action, is a term used in contradistinction to a chose or thing in possession, and is applicable to cases where the title to money or property is in one person, and the possession is in another, which by contract he is bound to deliver to the owner. [8 N. Y., 430; 14 Abb. Pr., 436.] *Supreme Ct.*, 1866, *Ayres v. The Western R. R. Co.*, 32 *How. Pr.*, 351.
2. Upon an application for the removal of a cause on the ground of citizenship or residence of a corporation which is a party thereto, the corporation will not be deemed a non-resident of the State, although chartered by the laws of another State, if it has a regular place of business within the State in which the action is pending, and has there an agent upon whom, by law, process may be served, and who has agreed to admit service of process. *New York Piano Co. v. New Haven Steamboat Co.*, *Ante*, 357.
3. The allegations of a petition for the removal of a cause from a State court to a court of the United States, under the provisions of the judiciary act, are not deemed conclusive, but may be controverted by the plaintiff. *Ib.*
4. The removal of several causes ordered, on the ground that the acts for which the defendant was sued were done by him as an officer of the United

SENTENCE.

States army, and under and by virtue of authority, derived from the president, and acts of Congress of the United States; and that, therefore, the case was within the act of Congress of 1863, entitling defendants in such cases to have a removal of the cause to a court of the United States. *Siebrecht v. Butler, Ante, 361, note.*

5. The defendant, by obtaining time to answer by an order from the court, and serving that with a notice signed by an attorney, as attorney for the defendant, has done what is equivalent to an appearance. This is doing an act within the progress of the cause, and submitting to the jurisdiction of the State court, and is equivalent to an appearance. [5 Duer, 610.] *Supreme Ct., 1866, Ayres v. Western R. R. Co., 32 How. Pr., 351.*

REPLEVIN.

ACTION, 6.

RIOT.

Of the remedy given by statute against a county, to recover the value of property destroyed by a riot. *Supreme Ct., 1866, Moody v. Board of Supervisors of Niagara County, 46 Barb., 659.*

SENTENCE.

1. Where, after conviction, and sentence in a capital case in a court of general sessions, the case is carried by writ of error to the supreme court, the judgment there affirmed, and finally carried to the court of appeals, and the judgment there affirmed, but not until the day of execution fixed by the sentence has passed, it is competent for the supreme court, on the record being returned to it from the court of appeals, to proceed and issue a warrant for the execution at a time newly fixed for the purpose by the supreme court. It is not necessary that the supreme court should pronounce sentence and judgment anew; but their doing this does not vitiate the proceedings. [3 Rev. Stat., 937, §§ 23, 24.] *Ct. of Appeals, 1866, The People v. Ferris, 32 How. Pr., 411.*
2. The act of 1859, ch. 432,—which provides that wherever the record, after conviction, shall be removed into the supreme court, the supreme court shall, upon affirming or reversing the judgment, remit the record to the court below,—does not apply to cases where the record is immediately removed out of the supreme court into the court of appeals upon the announcement of a judgment of the supreme court. If the record remained in the supreme court it would doubtless be regular for it to remit the record to the court below. But where it is immediately removed to the court of appeals, the statute does not make it obligatory upon the supreme court to remit the record to the court below upon its return from the court of appeals with the judgment and construction of the latter court. *Ib.*

SERVICE (AND PROOF OF.)

1. In an action for the foreclosure of a mortgage, it is sufficient, to entitle the plaintiff for an order allowing service of the summons to be made by publication, to show that the defendant on whom such service is sought to be made can not, after due diligence, be found in this State. Non-residence need not be proved. *Barnard v. Heydrick, Ante, 47.*
2. It is not necessary that an order for publication of summons should state that the affidavits referred to, on which the order was granted, afforded satisfactory evidence of the requisite facts. This may be presumed from the making of the order. *Ib.*
3. The fact that the summons and complaint are mailed before the *filing* of the order for service by publication and mailing, does not invalidate the service. *Silleck v. Heydrick, Ante, 57.*

AMENDMENT, 2; MOTIONS AND ORDERS, 10.

SET-OFF.

1. After an insurance company has become insolvent, the obligation of an insurer upon his premium note cannot be set off against his claim on the company for a loss. *Pardo v. Osgood, Ante, 365.*
2. The provisions of the Revised Statutes, regulating set-offs, explained and applied. *Ib.*
3. The usual stipulation in insurance policies of mutual companies, to pay the loss, after deducting the premium note if unpaid, is for the benefit of the company, and does not make a claim for a loss, and a debt upon the note, a case of mutual credits within the meaning of the statute. *Ib.*

SHERIFFS.

1. The principle that goods levied upon by the sheriff, under an attachment, are in the custody of law, only applies as between the sheriff and the defendant in the attachment suit. It does not extend to justifying a bailee, in whose possession the goods are attached, for refusing to deliver them to his bailor. *Ct. of Appeals, 1866, Rogers v. Weir, 34 N. Y., 463.*
2. After an actual arrest, and a negligent escape, a return by the sheriff that the debtor could not be found in his county is a false return, upon which an action will lie against him by the bail. *Supreme Ct., 1866, McArthur v. Pease, 46 Barb., 423.*

STATUTES.

SPECIFIC PERFORMANCE.

1. An agreement of the owner of land with his son that if the latter would go upon a part of the land, make improvements, and cultivate it, that he would convey to him, such agreement being performed on the part of the son, is a contract resting on a sufficient consideration, and may be enforced in equity. [41 Barb., 635.] *Supreme Ct.*, 1866, *Lobdell v. Lobdell*, 32 *How. Pr.*, 1.
2. Equity will enforce a parol agreement for a joint interest in land, at the instance of a party to it, who has fulfilled his part by full payment, and where it may be inferred that fraud would result from a refusal to decree performance. *Fannin v. McMullen*, *Ante*, 224.
3. Although a partial payment is not sufficient to take the case out of the statute, if full payment has been made, equity demands that execution should be decreed. *Ib.*
4. What is a sufficient part performance of a contract for the conveyance of lands, to take the case out of the statute, and authorize a court of equity to compel a specific performance. *Supreme Ct.*, 1866, *Brown v. Jones*, 46 *Barb.*, 400.

SPECIAL PROCEEDINGS.

1. Special proceedings in respect to animals running at large upon the public highways. *Laws of 1867*, ch. 814.
2. It is questionable whether a re-hearing upon the merits, in a special proceeding, can be granted, since the Code of Procedure, except upon an appeal to the general term. *Livingston's Petition*, *Ante*, 1.

BROOKLYN; HIGHWAYS; MANDAMUS.

STATUTES.

1. A law providing for raising money by taxes, in one county of the State, is not to be regarded as a local statute, within the provision of the constitution requiring the object of local statutes to be expressed in the title. *People ex rel. Bradley v. Stephens*, *Ante*, 350.
2. Since it is provided by the Revised Statutes, that "when a pecuniary penalty or forfeiture is specially granted by law to any person injured or aggrieved by an act or omission of another, the same may be sued for in an action of debt, or in an action of *assumpsit*" (2 *Rev. Stat.*, 480, § 1, 1st ed.), that is, sued for by the person to whom the penalty is granted,—it is not necessary that the act granting a pecuniary penalty or forfeiture in such cases should, in terms, provide in whose name the action for its recovery should be brought. Where it is given to a party injured or aggrieved by

STIPULATIONS.

- the act or omission of another, such party, in the absence of any provision to the contrary, may bring the action for its recovery in his own name. [2 Wait's Law & Pr., 284; 4 Denio, 374; 2 Comst., 182.] *Supreme Ct.*, 1866, *Thompson v. Howe*, 46 *Barb.*, 287.
3. An amendatory statute, in form declaring that the act amended "shall read as follows," if not made to correct an error in the former act, does not relate back and take effect from the passage of the original act, but only changes the original act from the passage of the amendment. [15 N. Y., 595, 598.] *Supreme Ct.*, 1866, *Town of Duanesburgh v. Jenkins*, 46 *Barb.*, 294.
 4. A court of equity will relieve a party against a fraud attempted through the prohibition of the statute of frauds, and in such a case will enforce a parol agreement, notwithstanding the statute. [Reviewing many authorities.] *Ct. of Appeals*, 1866, *Ryan v. Dox*, 34 N. Y., 307.
 5. The principles upon which it is to be determined whether the provisions of a statute are to be regarded as directory or as imperative,—stated. *The People v. Supervisors of Ulster*, 34 N. Y., 268.

AMENDMENT, 1; ARREST, 1; BOARD OF HEALTH.

STAY OF PROCEEDINGS.

1. An order staying proceedings until the hearing and decision of an appeal, does not extend the time to answer beyond the time of the decision of the appeal. *Petrie v. Fitzgerald*, *Ante*, 354.
2. Where such a stay has been made, it is at end as soon as the order upon the decision of the appeal has been entered of record; and the plaintiff is then at liberty to proceed, without regard to whether the defendant has had notice of the decision. *Ib.*
3. After such decision has been entered, it is irregular for the defendant to apply *ex parte* for an order to extend his time to answer, it having already expired. His proper course would be to apply on notice to be relieved from default, and have leave to answer. *Ib.*
4. Although, in ordinary cases, the court should grant a stay of proceedings, to enable a party to review their decision by an appeal, yet, where the property in controversy includes the good-will of a business which is continued by a receiver pending the proceedings,—e. g., the publication of a newspaper,—the court will not grant a stay of the sale, after protracted litigation, without some guaranty on the part of the party asking it, against depreciation in the value of the property, pending the stay. *Clark v. Brooks*, *Ante*, 385.

STIPULATIONS

Where the defendant, in a judgment recovered in a justice's court, gave a stipulation that execution might be issued thereon,—*Held*, that an execution. N. S.—Vol. II.—35.

SUPERVISORS.

tion issued by an attorney was not valid; and if it had been, it was competent for the defendant, before sale, to object to the enforcement of the execution. *Thompson v. Jenks, Ante, 229.*

ABATEMENT, 4; APPEAL, 7; COMPROMISE; MISTAKE.

SUBSCRIPTION.

A statute requiring an instrument to be in writing and subscribed, is generally satisfied by a printed instrument adopted by the party to be bound thereby. *Barnard v. Heydrick, Ante, 47.*

SUMMARY PROCEEDINGS.

An affidavit stating facts simply showing a cropping or cultivating of land on shares, does not suffice to give jurisdiction to a justice to issue a warrant under the statute. Such affidavit does not show the conventional relation of landlord and tenant, existing by an agreement; but it shows that the parties are tenants in common. *Supreme Ct., 1859, Russell v. Russell, 32 How. Pr., 400.*

SUMMONS.

A summons, issued by an attorney, with his name printed at the end thereof, is "subscribed" by him, within the meaning of the provision of the Code of Procedure, which requires the summons to be subscribed by the plaintiff or his attorney. *Barnard v. Heydrick, Ante, 47.*

SUPERIOR COURT (OF BUFFALO).

Act in relation to the crier of the superior court of Buffalo. *Laws of 1867, ch. 211.*

SUPERVISORS.

1. The duties and powers of supervisors in respect to the auditing of public accounts,—stated. *People v. Stocking, 32 How. Pr., 48.*
2. The supreme court cannot, upon a mandamus to a board of supervisors, requiring them to consider and act upon an unliquidated claim against the county, fix the amount which they shall allow. *People ex rel. Cagger v. Supervisors of Schuyler, Ante, 78.*

INDICTMENT, 2; MANDAMUS, 10.

SUPPLEMENTARY PROCEEDINGS.

1. It is immaterial where the debtor resides at the time the order for his examination is issued ; it is sufficient to confer jurisdiction, if it appear in respect to the residence of the judgment debtor, under the first subdivision of section 292 of the Code, that the *execution* was issued to the sheriff of the county where he then resided or had a place of business, &c., and as a matter of course it follows that the order must be made returnable before the judge at a time and place specified in the order, "within the county to which the execution was issued." [14 Abb. Pr., 251.] *Supreme Ct., Sp. T., 1864, Jesup v. Jones, 32 How. Pr., 191.*
2. Section 292, subd. 1, of the Code of Procedure,—which authorizes the issuing of an order for discovery of property and examination of judgment debtors,—amended by adding at the end the following provision :—"But in case of an order made by a justice of the supreme court all subsequent proceedings shall be had before some justice in the judicial district where the judgment debtor resides, to be specified in the order." *Laws of 1867, ch. 781, § 11.*
3. If a judgment debtor has notice of an order made by a judge, requiring a debtor of his to appear and be examined as to his indebtedness to the defendant, an assignment of the debt, subsequently made by the judgment debtor to a third person, will not relieve the claim from an order directing the payment of the same to the judgment creditor. [14 Abb. Pr., 339 ; 15 Id., 406 ; 32 Barb., 300 ; 22 N. Y., 535.] But in the absence of any proof of notice, or of service on the parties of any order restraining the payment of the money, or transfer of the claim, the assignee, if a *bona fide* holder for value, should be protected. [31 N. Y., 531.] If, however, the assignment was made for the purpose of defrauding the judgment creditor, the assignee will have no title. *Supreme Ct., 1866, Lynch v. Johnson, 46 Barb., 56.*
4. It is not necessary that an order, made in supplementary proceedings, directing a third person to pay to the plaintiff the amount of such third person's indebtedness to the judgment debtor should be served on the latter, unless required by the judge in his discretion. [17 Abb. Pr., 1 ; 15 Id., 373.] *Supreme Ct., 1866, Lynch v. Johnson, 46 Barb., 56.*
5. When a tax exceeding ten dollars in amount, levied by the board of supervisors of a county against a resident thereof, is returned by a collector to the county treasurer uncollected, for want of goods and chattels out of which to collect the same, the supervisor of the town or the county treasurer, within one year thereafter, may apply on affidavit to the county judge of the county, and obtain an order requiring such person to appear and answer concerning his property. The same proceedings may in all respects be had as in cases supplementary to execution ; and the same costs and disbursements may be allowed against the defendant, but none in his favor. The tax, if collected, shall be paid over to the county treasurer, and the costs collected from the defendant shall belong to the party instituting the proceeding. A county treasurer shall have no additional compensation for such proceeding ; and a supervisor shall have no other except his *per diem* fees for time spent in the proceeding. *Laws of 1867, ch. 361, § 1.*

TENDER.

6. This act shall take effect immediately, and apply to cases where returns have already been made by collectors, as well as to cases which may hereafter arise, provided that the proceeding be commenced within one year after the collector has made his return. *Ib.*, § 2.

SURROGATES' COURTS.

1. The surrogate has not power, without an account rendered or any inquiry into the assets and various debts of an estate, to decree the absolute payment, by the personal representative, of a debt not resting in judgment, and which is contested by him. *Ruthven v. Patten, Ante*, 121.
2. He cannot, upon a creditor's application for payment, and without any such accounting, try the merits of a disputed claim, and decree payment. And although the personal representative has once admitted the demand, his litigating it upon such application takes away the surrogate's jurisdiction. *Ib.*
3. Records of the surrogate's court of Albany defective, by reason of not having been duly signed, entered, and filed, or recorded, may be amended and made effectual. *Laws of 1867, ch. 69.*

APPEAL, 22.

TAXES.

1. One assessor cannot make an assessment. It is the joint act of all or a majority of the assessors. [1 Kern., 563, 571, 572.] An assessment made by one assessor is irregular and void, and no proceeding for the purpose of charging the tax-payer with a contempt for not paying the tax, can be founded upon it. *Supreme Ct.*, 1864, *Matter of Metcalf v. Messenger*, 46 *Barb.*, 325.
2. The provision of the statute requiring assessors to set down, in the assessment roll, the full value of all the taxable personal property of the person after deducting the just debts owing by him [1 Rev. Stat., 391], has no relation to the taxation of moneyed corporations. *Supreme Ct.*, 1866, *The People v. Board of Education of Lockport*, 46 *Barb.*, 588.
3. Parties assessed will not be held concluded against alleging any irregularity in the assessment, by reason of their not appearing at a meeting of the assessors, which it does not appear, and is not alleged, was ever held, or notice thereof given. *Supreme Ct.*, 1864, *Matter of Metcalf v. Messenger*, 46 *Barb.*, 325.

SUPPLEMENTARY PROCEEDINGS, 5, 6.

TENDER.

1. In order to constitute a valid tender, it must be proved that there was a production of the money, and an actual offer of it to the creditor, unless it be shown that the latter dispensed with it by some positive act or declaration. It is not enough that he had the money in his pocket, and informed his creditor that he was ready to pay, without offering to do so; nor that

TRIAL.

he retained it in an envelope. There must be an actual offer and presentation of the money, so that the creditor can take the money. [15 Wend., 637; 6 Id., 22; note a 35; 1 Wait's L. & P. and authorities cited, 1046, 1047.] *Supreme Ct.*, 1865, *Strong v. Blake*, 227.

2. Where a creditor, on being informed by a person that he had come to make a tender, referred him to his attorney, saying his office was open, and it was but a step, without, however, refusing to receive the money, or interposing any objection, or intimating in any way that the presentation of the money was not required,—*Held*, that this did not amount to a waiver of the production and offer of the money. *Ib.*
3. A tender of performance under a contract, not necessary when it must be nugatory. *Ct. of Appeals*, 1866, *Morange v. Morris*, 32 *How. Pr.*, 178.

TRADEMARKS.

1. A court of equity will protect a person in the use of a trademark,—e. g., the name of a newspaper,—although the name adopted is one that belongs to the language of the country, and may be employed in any way or for any purpose, which will not defraud individuals or deceive the public. The doctrine of the protection of trademarks does not depend entirely upon invasion of individual rights, but upon the broad principles of protecting the public from deceit. *Matsell v. Flanagan*, *Ante*, 459.
2. Where the plaintiffs had long published a newspaper entitled "The National Police Gazette,"—*Held*, that a preliminary injunction should be granted in an action to restrain the defendants from continuing the publication of a paper entitled the "United States Police Gazette," and printed in a way actually to deceive purchasers and readers. *Ib.*

TRESPASS.

The owner of lands which are not in his actual possession, but in that of his tenants, at the time of a trespass thereon, can only recover for such trespasses as were injurious to the inheritance. *Supreme Ct.*, 1864, *Wood v. City of Williamsburg*, 46 *Barb.*, 601.

TRIAL.

1. Where prisoners are jointly indicted, and they elect to have separate trials, it has always been allowed to the district-attorney to determine which of them he will first put upon his trial. It is purely a matter of discretion with him, and as he is by far the most competent, from his familiarity with the facts expected to be proved, to judge in this matter, his discretion will not be interfered with by the court, and a refusal thus to interfere, forms no ground of exception. *Supreme Ct.*, 1866, *Patterson v. The People*, 46 *Barb.*, 625.

TRUSTS (AND TRUSTEES).

2. In an action for damages for a libel, respecting the plaintiff's conduct in the management of theatrical representations, the fact that a juror declares himself opposed to theatrical representations, is not a ground of challenge for principal cause. *Maretzek v. Cauldwell, Ante, 407.*
3. Such an opinion does not amount to incompetency, and is therefore only a ground of challenge to the favor. *Ib.*
4. The extent of a cross-examination of a witness, upon matters immaterial to the issue, is in the discretion of the judge before whom the trial is had. *Ct. of Appeals, 1866, La Beau v. The People, 34 N. Y. 223.*
5. Collateral evidence from the witness himself, tending to discredit and disgrace him, and the asking of questions disparaging to the character of a witness, are not a matter of right to a party on cross-examination. Per *WRIGHT, J. Ib.*
6. Of the proper terms of the charge of the judge, in a trial for murder, where the defense is that the killing was in self-defense. *Supreme Ct., 1866, Patterson v. The People, 46 Barb., 625.*
7. An exception to a refusal to adopt in gross a series of propositions, in the form of requests to charge, is unavailing if either of the propositions be erroneous. The attention of the court should be drawn to each; and each should be the subject of a ruling by the judge, and a specific exception by the party. [3 *Seld.*, 266, 273; 20 *Barb.*, 343; 1 *Seld.*, 422, 427; 14 *N. Y.*, 437.] *Ct. of Appeals, 1866, Magee v. Badger, 34 N. Y., 247.*
8. A court can never be called upon to charge upon an assumed state of facts, not proven upon the trial. [5 *Sandf.*, 542; 12 *Abb.*, 420; 6 *Barb.*, 148.] *Ct. of Appeals, 1865, Pratt v. Ogden, 34 N. Y., 20.*
9. The rule is well settled, that where the validity of a sale or assignment of goods depends upon whether it was made with intent to hinder, delay or defraud creditors, the judge is bound to submit the case to the jury. See 6 *Hill*, 433.] It is expressly provided by statute, that the intent in such cases, "shall be deemed a question of fact and not of law." [2 *Rev. Stat.*, 137, § 4.] *Supreme Ct., 1864, Peck v. Crouse, 46 Barb., 151.*
10. The employment of stenographic reporters in the counties composing the fifth judicial district, on trials of issues of fact at any circuit court, court of Oyer and Terminer, or special term of supreme court, to be at the discretion of the presiding justice. Compensation regulated; duty of reporter to furnish copy of proceedings. *Laws of 1867, ch. 41.*

AFFIRMATIVE RELIEF; ARBITRATION; CAUSE OF ACTION, 8; INDICTMENT; MANDAMUS, 11; NEW TRIAL; NONSUIT; REFERENCE; WITNESS.

TRUSTS (AND TRUSTEES)

1. *It seems*, that a mere executor is not properly to be considered a trustee, within the meaning of the statute, or within the meaning of the rule of a court of equity, conferring authority upon that court to interfere with the execution of his trust, by removing him and appointing others to take his place. But when the trusts under a will, vested in the executor, are distinguishable from those attached to his office, the court may dismiss him

UNDERTAKING.

- as to the former and not as to the latter. [3 Barb. Ch., 76; 2 Id., 381.] *Ct. of Appeals*, 1866, *Wood v. Brown*, 34 N. Y., 337.
2. The defendant was allowed a compensation, by way of commission, for receiving rents and profits, as a trustee, although he was not a voluntary trustee, and the trust was not created by any written instrument. *Supreme Ct.*, 1866, *Cowing v. Howard*, 46 Barb., 579.
 3. As against the creator of a trust, under a trust deed securing to the grantor the rents, issues and profits of real estate, during life, with remainder over, the court will not interfere in behalf of the remainder men to give them more than is secured to them by the very terms of the settlement. *Livingston's Petition*, *Ante*, 1.
 4. Those claiming, in remainder, under such a trust deed, are interested in the management of the trust estate, and may have an injunction to prevent waste calculated to injure or destroy the estate in remainder; but the creator of the trust is the only person who is interested in the execution of the *express trusts* therein mentioned. *Ib.*
 5. The statute does not authorize a proceeding *by petition*, at the instance of those entitled in remainder, to remove a trustee of an *express trust* for receiving rents and profits, and applying them to the use of any person for life, and against the wishes of such *cestui que trust*. *Ib.*
 6. As a general rule, petitions can only be presented in an action pending, or in a matter over which the court has jurisdiction by some act of the legislature, or other special authority. *Ib.*
 7. The statute authorizing any person interested in the execution of express trusts to apply for the removal of a trustee on petition, was only intended to embrace that class of persons who are immediately interested, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee. *Ib.*
 8. The supreme court should not entertain a petition for the removal of a trustee, except upon the application of the person interested in the execution of the trust. *Ib.*
 9. Where the evidence, on such a petition, tends to show that the deed of trust was obtained by fraud and undue influence, from a person of weak and unsound mind, it is the duty of the court to dismiss the petition for the removal of the trustee, unless the judge is fully satisfied that the trust deed was the voluntary act of a sane man, competent to make it. *Ib.*
 10. Assuming, however, that the grantor was competent to create the trust, and that the deed is valid, the court ought not to remove the trustee against the wishes of the creator of the trust. *Ib.*

UNDERTAKING.

The surety in an undertaking given upon discharging an attachment, cannot defeat his liability to the plaintiff in the attachment, by showing that he was induced to execute it by fraudulent representations of the agent of the defendant whose surety he became. *Ct. of Appeals*, 1866, *Coleman v. Bean*, 32 How. Pr., 370.

USE AND OCCUPATION.

In what cases this form of action may be maintained. *Ct. of Appeals*, 1866, *Hall v. Western Transportation Co.*, 34 N. Y., 284.

VARIANCE.

1. In an action on insurance upon freight, the complaint alleged it generally as *insurance on freight*, and the proof was of an *insurance only on freight of flour*, and a *loss of freight partly of flour*, and partly of *wheat*.—*Held*, that it was a case of variance merely: and the allegation not having been controverted by the answer, and the evidence not objected to on the trial, no objection could be taken by way of exception to the finding of the judge, after the trial. *Supreme Ct.*, 1866, *Allen v. Mercantile Mutual Ins. Co.*, 46 Barb., 642.
2. Allegation, in a complaint for specific performance, of a contract to *sell and convey*, proof of an agreement that if the plaintiff would *take possession and improve* and cultivate, the defendant would *give him the land*;—*Held*, not a failure to prove the complaint in its entire scope and meaning, and that the variance was not material, and not having been objected to on the trial the defendant could not, upon appeal, avail himself of the objection that the agreement set forth in the complaint was not proved. *Supreme Ct.*, 1866, *Lobdell v. Lobdell*, 32 How. Pr., 1.

VENUE.

MANDAMUS.

WAIVER.

1. No implied waiver can ever be intended of an irregularity or omission of which the party sought to be charged with a waiver had no notice, or of which he cannot be charged with notice. Nor can a party be bound by the waiver of an irregularity in a proceeding which affects the public at large,—e. g., the omission of the necessary oath of referees in proceedings to lay out a highway. *Supreme Ct.*, 1866, *The People v. Conner*, 46 Barb., 333.
2. The drawer's promise to pay a check which has not been seasonably presented, is not binding as a waiver of presentment, unless he was aware or had notice of all the facts as to presentment that would tend to discharge him. *Hazelton v. Colburn*, *Ante*, 199.
2. What facts amount to a waiver, by owners of the land, of the right to have their damages assessed before a highway should be opened, worked, or used. *Supreme Ct.*, 1866, *Chapman v. Gates*, 46 Barb., 313.

WILLS.

WARRANT.

Poor.

WILLS.

1. The question of testamentary capacity is mainly a question of fact, and the great advantage of a personal inspection of the witnesses, and the opportunity of witnessing their manner of testifying, give to the primary tribunal peculiar opportunities for weighing the testimony, and giving to the respective witnesses that consideration to which their evidence is entitled. Where there is a conflict of testimony, such circumstances are of peculiar significance. *Ct. of Appeals*, 1865, *Gardiner v. Gardiner*, 34 N.Y., 155.
2. Rules for determining the competency of the testator, to be applied on question of probate. *Eau v. Snyder*, 46 Barb., 230.
3. The statute of 1860, relating to wills,—which provides that no person having a husband, wife, child, or parents, shall devise or bequeath to benevolent, charitable, literary, scientific, religious or missionary societies, in trust or otherwise, more than one-half part of his estate, after payment of debts,—is to be regarded as establishing a rule of public policy, rather than as creating a right in favor of the persons standing in the specified relation of the testator; and an heir who will be entitled to share in the estate, in case of the failure of the whole will, may raise the objection that the will contravenes the statute, although he is not of the class of relatives or connexions mentioned in the statute. *Supreme Ct.*, 1866, *Harris v. Slaght*, 46 Barb., 470.
4. There is not necessarily a legal objection to a will made by a ward in favor of a guardian. *Limburger v. Rauch*, *Ante*, 279.
5. If the guardian procures the execution of the will in his favor, the law presumes undue influence, and casts the burden of proof upon him to show the act to have been that of a voluntary, capable, and understanding testator.
Id
6. A devise and bequest of all the testator's real and personal estate, subject to the dower and thirds of his wife, does not entitle her to a third of the personal estate; but indicates an intention, merely to make a devise and bequest subject to her dower. *O'Hara v. Dever*, *Ante*, 418.
7. It would be otherwise of a direct provision, giving the wife dower and thirds. Under such a provision she would be entitled to one-third of the personal estate in addition to dower, after payment of debts and legacies.
Id.

WITNESS

1. Upon a joint indictment of two, one defendant cannot be received as a witness in behalf of himself and the other. The common law rule always excluded co-defendants from testifying for each other, and the relaxation of the rule as to such parties, and in respect to the defendant himself, effected by the 399th section of the Code, applies only to civil actions. [33 N. Y., 688.] *Supreme Ct.*, 1866, *Patterson v. The People*, 46 *Barb.*, 625.
2. When a layman is examined as to facts, within his own knowledge and observation, tending to show the soundness or unsoundness of the testator's mind, he may characterize, as rational or irrational, the acts and declarations to which he testifies. It is legitimate to give them such additional weight as may be derived from the conviction they produced at the time, The party calling him may require it, to fortify the force of the facts, and the adverse party may demand it as a mode of probing the truth and good faith of the narration. But to render his opinion admissible, even to this extent, it must be limited to his conclusions from the specific facts he discloses. His position is that of an observer, and not of a professional expert. He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question, whether the mind of the testator was sound or unsound. *Ct. of Appeals*, 1866, *Clapp v. Fullerton*, 34 N. Y., 190.
3. An exception to this rule is recognized in the case of attesting witnesses. They are present at the very act of execution, and their opinions on the general question of testamentary capacity are admitted *ex necessitate*. It is the policy of the law to provide all possible safeguards, for the protection of the heir as well as the testator. No light is excluded in reference to the *res gesta*, which can be furnished by the immediate actors. The subscribing witnesses may be required to state, not only such facts as they remember, but their own convictions as to the testator's capacity. For it may well happen, that on so vital a point they may retain a clear recollection of the general result, long after the particular circumstances are affected by lapse of time or obscured by failing memory. *Ib.*
4. The Code has not changed the common law rule that prohibits the wife from testifying, after the decease of her husband, to declarations made by him to her when no other person was present; and the reasons for refusing to allow her to testify to what her deceased husband said to her when they were alone, still exist. *Supreme Ct.*, 1865, *Keator v. Dimmick*, 46 *Barb.*, 158.
5. In an action by a husband for his own benefit, to which the wife is not a party, she is not competent as a witness for her husband; and it makes no difference that the point as to which her testimony is offered is a secret fact which no one but she and the defendant knew. *Supreme Ct.*, 1866, *Carpenter v. White*, 46 *Barb.*, 291.

WITNESS.

6. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding. *Laws of 1867, ch. 887, § 1.*
7. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. *Ib., § 2.*
8. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. *Ib., § 3.*
9. In an action against an executor, the plaintiff cannot be permitted to testify, as a witness on his own behalf, to what passed between him and the deceased, in her lifetime; nor to testify that certain conversations did not occur between him and the deceased. It matters not whether the object of the testimony is to prove the affirmative or a negative. *Supreme Ct., 1866, Clarke v. Smith, 46 Barb., 30.*
10. The effect of the successive amendments of § 399 of the Code of Procedure in respect to the admissibility as witness of assignors,—stated; and *Held*, that, under the amendment of 1859, an assignor was not excluded from testifying against a “legatee,” when suit was brought to recover from such legatee the amount of a judgment against the estate. *Ct. of Appeals, 1866, Hight v. Sackett, 34 N. Y., 447.*
11. Under § 399 of the Code, where both the parties to a conversation sought to be proved, are dead, and the witness offered to prove the conversation claims title under one of them, and the adverse party under the other, and against a party deceased under whom the witness claims, such witness is not admissible. *It seems*, that it makes no difference in such a case whether the witness took part in the conversation or not. *Supreme Ct., 1866, Lobdell v. Lobdell, 32 How. Pr., 1.*
12. Section 399 of the Code of Procedure,—authorizing parties to be examined as witnesses on their own behalf,—amended to read as follows:—A party to an action or special proceeding in any and all courts and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness; provided, however, that no party to the action or proceeding nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who, previous to such examination has had such an interest however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding, can in any

WITNESS.

manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor, or committee, shall be examined on his own behalf in regard to such transaction or communication or the testimony of such deceased or insane person or lunatic in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing on behalf of such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 8 of this act shall be held or construed to affect or restrain the operation of this section. *Laws of 1867, ch. 781.*

ASSIGNMENT, 1 ; DEPOSITION, 1 ; EVIDENCE.

THE END.

UC SOUTHERN REGIONAL LIBRARY FACILITY



A 001 166 710 2

